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Supreme Court, U.S.
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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,

Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC. AND ELLIOT FINEMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5613

ELLIOT FINEMAN; THE INDUSTRY NETWORK SYSTEM, INC.

Appellants

vs.

ARMSTRONG WORLD INDUSTRIES, INC.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 84-03837)

Argued
March 3, 1992
Before: STAPLETON and MANSMANN, *Circuit Judges*, and
FULLAM, *District Judge*.*

(Filed October 28, 1992)

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* Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In a civil action brought in the United States District Court for the District of New Jersey, an entrepreneur, Elliot Fineman, and his corporation, The Industry Network System, Inc. (TINS), sought to recover against Armstrong World Industries, Inc., a prominent manufacturer of floor covering products, for losses sustained after TINS folded. Conceived in late 1983, the TINS concept employed novel video technology to produce a monthly videotape magazine for retailers of floor covering products to be sold through distributors. Fineman contended that Armstrong, anticipating the launching of its own videotape network, interfered with TINS' prospective contract with an Armstrong floor covering distributor to distribute the TINS video magazine. As a result of losing this contract, TINS lacked the cash flow necessary to continue in business and folded. Fineman, formerly an industry consultant, allegedly suffered injury to his reputation that destroyed his consulting business. Additionally, Fineman and TINS asserted that Armstrong, a leading manufacturer of resilient floor coverings, coerced its distributors to refuse to deal with TINS by employing its alleged leverage in the resilient floor covering market to eliminate TINS and to gain a competitive advantage in the secondary market of videotape magazines. Having cleared from the field an early competitor, Armstrong prepared, according to Fineman, to enter the videotape magazine market unencumbered by competition.

Armstrong argued in defense that TINS' opportunities for success were specifically limited by its

allegedly inferior product, high pressure sales tactics or poor business projections. In general, Armstrong implied that the risk inherent in starting any small business is further heightened in the magazine industry, where start-up costs and barriers to entry are low and competition is, consequently, stiff.

The jury agreed with TINS and Fineman, rendering a verdict for them on the tort and the antitrust claims, including the imposition of punitive damages. The district court, in part assessing the strength of the evidence differently, granted judgment notwithstanding the verdict,[1] and in the alternative, a new trial.

With respect to the judgment n.o.v., the parties dispute whether the plaintiffs have proven their tortious interference claims, are entitled to punitive damages on that claim and whether Armstrong exercises monopoly power in the resilient floor covering market, a prerequisite to TINS' Sherman Act section 2 claim. They also contest the district court's grant of a directed verdict for Armstrong on TINS' section 1 claim, specifically, whether the meeting of the minds required to establish a claim of concerted action under section 1 of the Sherman Act requires a shared motive. Finally, TINS challenges the grant of summary judgment to Armstrong on TINS' contract claim, disputing Armstrong's obligations under the 1984 TINS-Armstrong Settlement Agreement. We will address the judgment n.o.v., new trial, directed verdict and summary judgment orders in that sequence.

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[1] Since this trial and all subsequent motions occurred prior to the amendment of Rule 50 providing for judgment as a matter of law, in this opinion we will employ the traditional terminology of directed verdict and judgment notwithstanding the verdict that was in effect until December 19, 1991.

I. *Jurisdiction*

The district court exercised subject matter jurisdiction over the Sherman Antitrust Act claims, 15 U.S.C. §§ 1 and 2 (Counts 1 and 2), and pendent jurisdiction over the remaining state law claims: breach of contract (Count 3); tortious interference with contract under New Jersey law (Count 4); New Jersey antitrust claims (Count 5) and Armstrong's counterclaim averring that the plaintiffs engaged in civil conspiracy.

We exercise appellate jurisdiction over the final order of the district court granting judgment n.o.v. for Armstrong on the tortious interference, Sherman Act section 2 and New Jersey antitrust claims; dismissing Fineman's individual monopoly claim, the Sherman Act section 1 claim, the breach of contract claim, and Armstrong's counterclaim; and alternatively granting a new trial on the tort and section 2 claims.

II. *Facts*

A. *The Parties*

A brief introduction into the structure of the floor covering distribution scheme, and Armstrong's specific characteristics, will serve as useful background for understanding the discrete conflicts at issue here. Later, we will detail the facts relevant to each legal issue. A thorough review of the record is necessary because this appeal is so fact specific. The following recitation reviews undisputed facts or casts the facts in the light most favorable to the verdict winners, the plaintiffs.

Floor coverings are distributed to retailers from manufacturers through distributors, also known as wholesalers. Floor covering distributors may often be "captive" to their manufacturers, carrying only that manufacturer's line of one particular product. This is frequently the case with Armstrong's distributors of its resilient floor coverings. This captivity appears to be limited to product lines; thus, a distributor may carry only Armstrong's resilient line but a different manufacturer's carpet or ceramic tile line. For purposes of this opinion, an "Armstrong distributor" denotes a distributor that is "captive" to Armstrong for its resilient line but may also carry non-Armstrong non-resilient lines. It also bears emphasis that Armstrong does not possess any ownership interest in its distributors. On this record, a typical Armstrong distributor depends upon Armstrong for 95% of its resilient business[2] but 50% of its overall business.

By contrast, *retailers*, who range from "mom and pop" outfits to chain floor covering retailers to other retailers that carry floor covering as a sideline, *e.g.*, furniture, hardware, wallpaper and paint stores, and lumberyards, generally carry various brands; they purchase floor covering products from competing distributors. Depending upon the manufacturer and the specific product line, retailers may choose to buy from distributors competing within the same manufacturer's product line. Armstrong, for example, promotes intrabrand competition for its resilient line by supplying resilient to multiple distributors within any given territory. Thus distributors vigorously compete for retailer loyalty, floor space and displays, in large part because they have very little flexibility in pricing their products. Distributors vie for sales by offering "specials" or "promotions"

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[2] The remaining 5% of its resilient business might consist of sales of adhesive products or other accessory products that are not supplied by Armstrong.

on items, which are frequently financed by the manufacturers. In addition, some retailers purchase directly from manufacturers, although Armstrong deals exclusively through its distributors.

1. *Armstrong World Industries, Inc.*

During the relevant 1983-1984 time period, Armstrong World Industries, Inc., manufactured both carpet and resilient floor covering products.[3] "Resilient" is the industry name for vinyl floor coverings, manufactured in either sheeting or tile form, and most commonly identified with the brand name "linoleum." Resilient constitutes only one of many types of "hard" floor coverings, including wood, ceramic tile, and natural floor coverings such as stone and marble. In industry jargon, "hard" floor coverings are distinguished from "soft" floor coverings, familiarly referred to as carpeting.

Armstrong's dual corporate structure flowed from its two floor covering products and consisted of twin carpet and resilient divisions. At the regional level, each division maintained its own district managers and sales force. During the relevant time period, Robert Roth served as the New York area district manager for Armstrong's resilient division and Robert Guzinsky was Roth's counterpart in Armstrong's carpet division. These men appear to have had little horizontal contact, except, for example, when a distributor carrying both lines required some financial counseling or advice from its respective district managers.

At the distributor level, however, one significant difference between the two Armstrong divisions is apparent.

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[3] Armstrong has since sold its carpet division and has added a ceramic tile line.

Armstrong sells to any number of resilient distributors within a defined geographic territory, which fosters keen competition among Armstrong's own distributors as well as with other manufacturer's distributors. Armstrong's carpet division, on the other hand, grants exclusive territorial rights to each of its carpet distributors, thereby insulating them from intrabrand competition.

2. *Elliot Fineman and TINS*

Elliot Fineman began his career in the floor covering industry in 1963 as a salesman for a New York area carpet retail company, Benjamin Berman. During his fourteen year tenure at Berman, in which he worked his way up to the position of president, he developed a unique inventory control system. J.A. at 1565-7; 6398-6404. In 1977, Fineman left Berman to start a consulting business, Cost-Free Internal Profits Systems (CFIPS), largely premised on this inventory control system. As Gail Farrer, a TINS principal who followed Fineman from Berman to CFIPS explained, CFIPS aimed to achieve increased profitability from inside a floor covering distributor's company by reducing inventory and the costs associated with maintaining an excessive amount of inventory. J.A. at 3359-60. Fineman explained that a distributor's profits are a matter of pennies on the dollar so that reducing the cost of maintaining inventory could be quite profitable. Fineman testified that CFIPS charged an average consulting fee of $200,000 and guaranteed its client's satisfaction. J.A. at 1587-90.

In 1982, Fineman originated the TINS concept, a monthly magazine in the form of a videotape targeted to floor covering retailers. After conducting market studies confirming support for the idea, he launched the TINS magazine in August 1983. J.A. at 1646. The TINS magazine included four regular

segments: 1) a journalist's report on industry trends; 2) Fineman's interview of an expert on key business topics; 3) Farrer's segment highlighting a successful retailer and its tips for success; and 4) the distributor's "tag," a personalized segment in which each distributor would communicate with its retail customers. The advantage of the tag lay in offering promotions, or discounted specials, to the retailer. Retailers typically were supplied by several distributors, so that those offering retailers additional promotions could expect to reap a competitive advantage. According to Fineman, the tag also reduced overhead costs associated with promotions because it enabled distributors to reach their retailers efficiently and simultaneously, and eliminated the need for individual visits to each retail customer.

Fineman's corporation, The Industry Network System (TINS), marketed its monthly video magazine to floor covering retailers through their distributors. TINS conducted sales training for each distributor prior to "launching" an intensive four to six-week sales effort by that distributor's sales force. In exchange for paying a marketing rights fee to TINS, these distributors were promised commissions or royalties based upon subscriptions and video equipment sold.[4] In addition, Fineman assured the distributors that their tags would generate increased sales without additional overhead, thus yielding substantial "incremental profits."

Because Armstrong distributors typically employ more salespersons than distributors of other floor covering products, TINS especially targeted them as its distributors. TINS asserts that signing up *Armstrong* distributors for TINS

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[4] TINS entered into an agreement with RCA to have RCA supply televisions and video cassette recorders at a discounted price. Both the distributor and TINS received commissions on these equipment sales.

was critical: in addition to being a leading manufacturer of resilient, Armstrong distributors typically maintain a sales force specialized in selling only Armstrong products. For this reason, Armstrong distributors by and large employ more salespersons than non-Armstrong distributors, ensuring TINS access to a greater number of retailers through Armstrong distributors.

TINS successfully signed up two Armstrong distributors. When a third prospect voiced concern that Armstrong might not approve of TINS, Fineman contacted Armstrong's Lancaster, Pennsylvania headquarters and on September 7, 1983, spoke to James Humphrey, Armstrong's general manager of Sales and Marketing for the Floor Division, to explain the TINS format and its potential for Armstrong distributors. *See* J.A. at 7518 (Humphrey's handwritten notes of conversation outlining TINS format and naming distributors contacted). Fineman testified that at this time he was unaware of Armstrong's plans to enter the video market but he later learned that Armstrong was several years behind TINS in the development of a video network. J.A. at 1898-1901.

Humphrey voiced four concerns about TINS to his superior, Dennis Draeger, Armstrong's vice president of floor covering operations. First, TINS' offers of exclusive territory to distributors might conflict with Armstrong's policy of not favoring any single distributor within a geographic area, or maintaining a "level playing field" among its distributors. Second, Humphrey believed that involving Armstrong's distributor's salespersons in selling TINS would interfere with Armstrong's strong preference for maintaining specialized sales forces. Third, the TINS magazine would highlight many products that competed with Armstrong's. Fourth, Armstrong voiced concern over equipment incompatibility. It had plans for a video program that would employ Sony "Betamax" equipment

whereas the TINS magazine used a VHS format. J.A. at 3735-36.

Subsequent to this telephone call, Humphrey disseminated the following memorandum to Armstrong's Floor Division District Managers on September 12, 1983:

> There is a possibility some of your wholesalers might contact you regarding a new video based retail floor covering communication program being introduced called "TINS." The program is being presented to independent wholesalers throughout the country for sale to floor covering retailers in specific territories. The objective is to establish a network of retailers who will utilize various video based programs on a monthly basis. The system would also allow for some localized wholesaler presentation, which the wholesaler must produce locally.
>
> We feel the "TINS" program will require a considerable amount of selling time on the part of wholesaler salesmen, which could be better utilized selling [Armstrong products]. At the same time, we feel this program conflicts with our future video plans and would not prove to be in our best interest.
>
> We have heard that the organization selling "TINS" has stated that several Armstrong wholesalers have already purchased the system and will be selling it

> to their customers. To the best of our knowledge, no Armstrong Floor Division wholesaler has committed to the "TINS" system. Some have been approached; however, they haven't agreed to merchandise the system.

J.A. at 7280. A September 27, 1983 memo from Armstrong's New York Regional Manager of the Carpet Division, Robert Guzinsky, to his distributor sales managers parroted much of Humphrey's memo.[5] A third memorandum sent to Armstrong

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[5] Guzinsky's memo read, in pertinent part:

> There is a possibility that some of you may be contacted regarding a new video based retail floorcovering communications program being introduced called "TINS." The program is being presented to independent wholesalers throughout the country for sale to floorcovering retailers in specific markets. The objective is to establish a network of retailers who will utilize various video based programs on a monthly basis. The system would also allow for some localized wholesaler presentation, which the wholesaler must produce locally.
>
> We feel the "TINS" program will require a considerable amount of selling time on the part of your wholesaler salesmen, which I know you would agree, could be better utilized selling [Armstrong products]. At the same time, we feel this program conflicts with our mutual video plans and would not prove to be in our mutual best interest.
>
> We have heard that the organization selling "TINS" has stated that several Armstrong wholesalers have already purchased the system and will be selling it to their customers. To the best of our knowledge, no Armstrong wholesaler has committed to the "TINS" system. Therefore, if you receive any queries, you will have this information.
>
> We are working constantly to develop logical video systems such as the program you will be showing shortly to your carpet Studios and feel we can satisfy both our needs in this area.

marketing representatives in the Detroit area from their district manager, dated October 23, 1983, was largely excerpted from Humphrey's memo.[6] J.A. at 7591.

Fineman responded, in the fall of 1983, by threatening Armstrong with an antitrust lawsuit. The dispute culminated in a settlement agreement. Drafted in January 1984,

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J.A. at 7286.

[6] District Manager Csrnko wrote:

> We have been advised via Lancaster that there is a possibility that some of our wholesalers, if not all, might be contacted regarding a new video based retail floor covering communication program being introduced called "TINS." This program is being presented to independent wholesalers throughout the country for sale to floor covering retailers in specific territories. The objective is to establish a network of retailers who will utilize various video based programs on a monthly basis. The system would also allow for some localized wholesaler presentation, which the wholesaler *must* produce locally.
>
> We obviously feel the "TINS" program will require a considerable amount of selling time on the part of wholesaler salesmen, which could be better utilized selling [Armstrong products]. At the same time, we feel this program conflicts with the future video plans and certainly would not prove to be in our combined best interests.
>
> The organization selling "TINS" has stated that several Armstrong wholesalers have already purchased the system and will be selling it to their customers. To the best of our knowledge, no Armstrong Floor Division wholesaler has committed to the "TINS" system. Some have been approached; however, they haven't agreed to merchandise the system. Therefore, if you receive any inquiries regarding "TINS," please try to discourage your wholesalers [sic.] participation and offer suggestions on how their time could be directed towards [sic.] a more important Armstrong sales effort. Additionally, please notify me as soon as the offer has been made to your wholesaler. I want to make sure we all stay on top of this competitive effort.

J.A. at 7591.

the settlement agreement was signed by Fineman in March of 1984, after a "trial period" in which Fineman signed up three Armstrong distributors and satisfied himself that Armstrong would not continue to interfere with his marketing of TINS. In general terms, the settlement agreement required Armstrong Vice President Dennis Draeger to notify Armstrong's district managers that it had no objection to TINS and required him to send a letter to a list of its distributors explaining that it had no objection to their distributing the TINS magazine. In addition, Fineman could request that Armstrong send a similar letter to prospective TINS distributors.

3. *Stern & Company*

At the crux of this lawsuit is an Armstrong distributor's change of heart with respect to the TINS magazine. On May 24, 1984, after TINS' settlement negotiations with Armstrong, Fineman and TINS salesman John Wolfe met with Alan Abrahamson, president of Stern & Company, and with Stern's three sales managers: Ken Cloud, John Fischer, and Gray Owen. After receiving Fineman's sales pitch, Abrahamson and his sales managers conferred and agreed to distribute TINS. Abrahamson testified that his sales managers were divided in their support for TINS: Fischer, the resilient sales manager, did not favor TINS, Owen, the carpet manager, slightly favored TINS; and Cloud, the new ceramic manager, highly favored TINS. J.A. at 4286. Abrahamson favored TINS and agreed to sign the letter of intent. *See* J.A. at 7865.

Fineman assessed distributor marketing rights for Stern at $16,000. After Abrahamson explained that Stern was undergoing some financial difficulty, Fineman required only a 25 percent down payment on that day, J.A. at 1712, which constituted half of the standard 50 percent down payment ordinarily required at the time of the signing of the letter of

intent. The balance was to be paid within four to six months. Abrahamson testified that he understood that the royalties from TINS sales received in the first six months would cover the initial $16,000 distributor rights fee. J.A. at 4290. There is no dispute that Stern would not receive exclusive marketing rights for TINS within its sales territory. J.A. at 4427. At that time Fineman and Abrahamson also discussed CFIPS and Abrahamson indicated his interest in receiving a proposal from Fineman for consulting work.

As will later be detailed at length, Abrahamson informed TINS' John Wolfe, following the TINS sales training of Stern's salesmen, that Stern was withdrawing from TINS. TINS relies heavily for its tortious interference and antitrust conspiracy claims on two communications from Armstrong that intervened between Stern's letter of intent and discontinuance of the TINS program. First, during a June 7th meeting, at which Abrahamson and Armstrong's regional sales manager for resilient Robert Roth were present, TINS was discussed for approximately 10-15 minutes, and Roth told Abrahamson that TINS would not "mak[e] a lot of sense in the Armstrong scheme of things" because Armstrong has an "overlap program." J.A. at 4084.[7] Second, Armstrong executive Humphrey sent a memo dated June 12, 1984, to all Armstrong floor division managers explaining what field managers should tell distributors about Armstrong's "participation" with TINS: that Armstrong would be "unable to offer any assistance" to that distributor. J.A. at 7323.

As a result of Stern's withdrawal, TINS lacked the capital required to produce the videotapes already under

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[7] Armstrong's local sales manager for carpet, Robert Guzinsky, also at the meeting, reportedly told Abrahamson that TINS "sounds like a good idea" J.A. at 4048.

contract. TINS ultimately was forced to dissolve its operations. Fineman then threatened to sue Stern for breach of contract and Stern threatened to counterclaim on the basis that TINS had violated the registration and disclosure requirements of the Connecticut Business Opportunity Investment Act, Conn. Gen. Stat. §§ 36-503 to 36-521, and that the Connecticut Act barred TINS from enforcing the letter of intent. J.A. at 8553-55. TINS and Stern settled their dispute on August 9, 1984, and executed a mutual release of liability. J.A. at 8557.

B. *Procedural History*

In September of 1984, Fineman and TINS filed suit against Armstrong World Industries, Inc. in the United States District Court for the District of New Jersey, alleging generally that Armstrong had influenced Stern to breach its contract with TINS in an effort to drive TINS from the market for video magazines in the floor covering industry. In a five count complaint, the plaintiffs sought compensatory, punitive, and treble damages as well as interest, costs, attorneys fees and injunctive relief.

Count One alleged that Armstrong had violated section 1 of the Sherman Act by "pressur[ing], persuad[ing] and otherwise influenc[ing] its independent distributors not to deal with, and indeed to break agreements with, the plaintiffs, thereby cutting off a critical supply of distributors to the plaintiffs." Compl. ¶ 25. Count Two alleged a violation of section 2 of the Sherman Act, asserting that Armstrong possessed monopoly power in the resilient floor covering market which it exercised in an attempt to monopolize a market defined as "consist[ing] of the sale of video magazines to retailers of the floor covering industry [and other interested entities]." Compl. ¶¶ 8; 31-32. For the remaining counts, brought pursuant to the laws of New Jersey and Pennsylvania, the plaintiffs asserted the

federal court's pendent or diversity jurisdiction. Count Three alleged that Armstrong's conduct constituted a breach of the 1984 settlement agreement between TINS and Armstrong. Compl. ¶ 35. Counts Four and Five alleged intentional interference with contract, Compl. ¶ 37, and a violation of the New Jersey antitrust laws, respectively. Compl. ¶ 39. During trial, when Fineman pressed individual antitrust and tort claims that had not been clearly delineated as counts in the complaint, the district court ruled that the complaint fairly stated Fineman's individual tortious interference claim but rejected his individual antitrust claims.

On May 25, 1988, the district court granted partial summary judgment in favor of Armstrong, dismissing the breach of contract claim and all claims related to Armstrong distributor Nelson & Small. A lengthy jury trial then ensued and at the close of plaintiffs' case, the district court directed a verdict for Armstrong on the Sherman Act section 1 claim, concluding that as a matter of law, co-conspirators in a vertical relationship with one another could not share the requisite anticompetitive motive for an agreement prohibited under section 1. The district court dismissed Fineman's individual antitrust claims, a ruling which has not been appealed, but permitted the jury to decide Fineman's individual tort claim, although the court excluded punitive damages on that claim. J.A. at 6828-29.

On April 19, 1991, the jury returned a verdict for the plaintiffs on all the remaining counts. Specifically, it awarded $19.5 million to TINS on its section 2 antitrust claims and $17.7 million to TINS and $2.275 million to Fineman, individually, on their respective tortious interference claims.[8]

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[8] The district court merged the state law antitrust claims with the Sherman Act claims.

The jury also awarded TINS punitive damages of $200 million. Subsequently, the district court ordered that when the judgment became completely final after all post-trial motions and appeals, TINS would have to elect to recover damages under either the antitrust or the tort causes of action. Finally, in a ruling not challenged on appeal, the district court dismissed Armstrong's counterclaims against TINS and Fineman. J.A. at 89-108.

On June 20, 1991, the district court granted Armstrong's motion for judgment n.o.v. on the tort and antitrust claims which the jury resolved in favor of the plaintiffs. *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 225 (D.N.J. 1991). In the alternative, the district court also conditionally granted a new trial because it found that the verdict was against the weight of the evidence and that the plaintiffs' trial counsel's improper summation grossly prejudiced and inflamed the passions of the jury. The plaintiffs appeal from these final orders requesting essentially that we reinstate the jury's verdict. We turn, initially, to the entry of judgment n.o.v., which we will reverse in part, and then, in Part V, to the alternative grant of a new trial, which we will affirm.

III. *Tortious Interference*

In this section, we address the tortious interference claims. In Part A, we discuss the question of whether Armstrong waived its grounds for judgment n.o.v. In Part B, we deal with the defendant's contention that the TINS/Stern settlement bars any claims arising out of these facts. Part C begins our substantive discussion of the tort claim and in Part D we examine a Connecticut statute to determine whether the plaintiffs have satisfied the element of reasonable expectation of economic advantage. In Part E, we reach the question of the

sufficiency of the evidence on the tort claims, and in Part F, we address Fineman's individual tort claim; and finally, in Part G, we address punitive damages.

A. *Waiver*

The plaintiffs pose a threshold procedural question: whether Armstrong properly preserved its contention that TINS and Fineman individually failed to present sufficient evidence of their tortious interference claims such that the district court's grant of judgment n.o.v. on these grounds violated the plaintiffs' Seventh Amendment right to a jury trial. Because the claims of each plaintiff were addressed separately at trial, we will discuss each in turn.

1. *TINS*

The district court reasoned that judgment n.o.v. on TINS' tortious interference claim was appropriate because TINS had failed to prove that the Connecticut Business Opportunity Investment Act did not bar its tort claim and because TINS had not produced sufficient evidence of wrongful conduct by Armstrong nor that this conduct was the proximate cause of its injury. On appeal, TINS contends that Armstrong failed to preserve these issues in its oral motion for directed verdict. The district court concluded that it had preserved these grounds. *Fineman*, 774 F. Supp. at 230.

In order to preserve an issue for judgment n.o.v., the moving party must timely move for a directed verdict and specify the grounds for that motion. FRCP 50(a); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *Mallick v. Int'l Bhd. of Elec. Workers*, 644 F.2d 228 (3d Cir. 1981); *Orlando v. Billcon Int'l, Inc.*, 822 F.2d 1294, 1298 (3d Cir. 1987). Absent

a motion in accordance with Federal Rule of Civil Procedure 50(a), judicial reexamination of the evidence abridges the plaintiff's Seventh Amendment right to a trial by jury. As explained in *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976), to enter a judgment notwithstanding the verdict in the absence of a proper motion for a directed verdict "is simply to ask the court to reexamine the facts already tried by the jury and this the court may not do without violating the Seventh Amendment."

Requiring compliance with Rule 50(a)'s commandment that "[a] motion for a directed verdict shall state the specific grounds therefor" additionally ensures that the party bearing the burden of proof will have an opportunity to buttress its case before it goes to the jury and the moving party will not gain an unfair advantage through surprise. *Orlando*, 822 F.2d at 1294; *see Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 562 (3d Cir. 1989) (the purpose of moving for a directed verdict before judgment notwithstanding the verdict is to afford the opposing party an opportunity to cure defects in its proofs prior to submission of the case to the jury); *see also Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153, 1161 (3d Cir.), *cert. denied*, 493 U.S. 993 (1989).

TINS does not suggest that Armstrong failed to request a directed verdict timely; indeed the record reflects that Armstrong orally moved for a directed verdict at both the close of the plaintiffs' case and at the close of all of the evidence. J.A. at 3612; 6716. Rather TINS rests its waiver argument on the second requirement, namely that Armstrong failed to specify adequately that with respect to TINS' tortious interference claim, its motion rested partly upon insufficiency of the evidence.

The record reveals that Armstrong's counsel moved for a directed verdict at the close of the plaintiffs' case

on grounds that the record was critically deficient of evidence of coercion and that the tort claims could not be maintained in light of the Connecticut Act. Although the oral argument on this directed verdict motion focused primarily on the effect of the Connecticut Act and the antitrust claims, Armstrong's counsel stated that "I will come back to the factual aspects of our position [on] the inducement claim. We don't believe there is sufficient evidence of coercion here to sustain that claim." J.A. at 3587-88. During the course of that argument, Armstrong's counsel did not return to that contention in the context of discussing the tort claim. Later, during the oral argument on its renewed motion for directed verdict at the close of all of the evidence, Armstrong returned to the theme that the plaintiffs had not adduced evidence that Armstrong's conduct did not constitute legitimate business activity. J.A. at 9103. Although this issue was raised in connection with the antitrust claim, it also applied to the argument concerning the tort claims. The record thus clearly supports the district court's conclusion that Armstrong had properly preserved each of these grounds. *Fineman*, 774 F. Supp. at 230.

While it is true that Armstrong's counsel could more clearly have identified the grounds for directed verdict by intoning the words "insufficiency of the evidence on the tortious interference claim," or more elaborately arguing that ground, we conclude that Armstrong's counsel did argue the factual components of an insufficiency of the evidence claim in terms which adequately apprised the district court and plaintiffs' counsel of the reasons for its motion. Because Armstrong raised the factual components, plaintiffs' counsel was clearly on notice of the legal rubric under which Armstrong planned to proceed.

This case is distinguishable from *Orlando*, in which the motion for directed verdict was premised solely upon a liability issue but judgment n.o.v. was sought on a damages

issue. *Orlando*, 822 F.2d at 1298. Our reasoning in *Orlando*, that the plaintiff was not given notice that the adequacy of the proof of damages was disputed since the motion for directed verdict rested solely on the insufficiency of the evidence to prove unlawful interference, *id.*, is not implicated here. Rather, this case more closely follows *Acosta v. Honda Motor Co. Ltd.*, 717 F.2d 828 (3d Cir. 1983). In *Acosta* we recognized that defense counsel should have been more explicit in stating the grounds for its directed verdict motion. We nonetheless held that the communicative content, "'specificity' and notice-giving function of an assertion should be judged in context." *Id.* at 832 (citation omitted). Moreover, we noted that plaintiff's counsel and the district court had both "understood and responded" to defense counsel as if he *had* been more specific. *Id.* The same is true in this case where the district court ruled, prior to acquiring a transcript, that the issues had been preserved.

2. *Fineman Individually*

With respect to his individual tortious interference claim, Fineman contends that Armstrong also failed to preserve the issue of insufficiency of the evidence in its motion for directed verdict. The resolution of this claim rests upon the unique factual circumstances here and the evolution of Fineman's individual tort claim during the trial. Armstrong responds that Fineman posed his individual claim for tortious interference for the first time after the district court dismissed his individual antitrust claims, which followed the close of the plaintiffs' case and Armstrong's initial timely motion for directed verdict. In support of this position, Armstrong contends that both the complaint and the pretrial statement contain only an individual *antitrust* claim and that Fineman retooled his individual claim to aver tortious interference after the district court dismissed his individual antitrust claim. Because the individual tort claim surfaced after Armstrong's

initial directed verdict motion, Armstrong contends that it could not have waived its objections at that time.

Although Fineman's individual tort claim may have been inartfully pleaded,[9] by April 1, 1991, after several months of trial, the district court had ruled that it was a viable claim, prompting Armstrong, during its renewed motion for directed verdict at the close of all the evidence, to raise "two main grounds": (1) Fineman was not a party to the Stern-TINS contract, and (2) New Jersey law does not provide for a tortious interference claim by a non-party. J.A. at 9057-58.[10] Given the manner in which this claim developed at trial, we cannot fault Armstrong for having failed to move for directed verdict upon this claim until the close of the evidence and hold that

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[9] Paragraph 28 of the Complaint, falling under a section entitled "Count I" (the section one antitrust claim) provides:

> [as a result of Armstrong's conduct], plaintiff Fineman's reputation as a management consultant, in fact one of the leading management consultants in the floor covering industry, was severely damaged. He was thus eliminated as a credible force in assisting distributors to reduce their inventory levels, thus permitting Armstrong to sell to its distributors more inventory than they actually needed. It is extremely damaging to a management consultant to have suffered an insolvency, given the nature of such a profession. Confidence in such a person is lost if it is known that the consultant's own business went under.

In addition the pretrial statement includes in the plaintiffs' statement of legal issues the following: "Plaintiff Fineman is entitled to an award of lost earnings or profits from his consulting business." J.A. at 780. The district court ruled that both the Complaint and pretrial statement adequately averred Fineman's individual tortious interference claim. J.A. at 6827.

[10] Armstrong's counsel prefaced this statement of the issues with an assertion that he had "nothing really to add that's not in our brief." A search of the docket sheet in the district court reveals that this document was not filed with the Clerk's office and therefore does not appear of record. For that reason we have before us only the oral statement of the two grounds for directed verdict.

these grounds for judgment n.o.v. on this claim were adequately preserved.

B. *The TINS-Stern Settlement*

Before reaching the merits of the tortious interference claim, we must also briefly address Armstrong's contention that the plaintiffs' tort claims are barred by the TINS-Stern release executed in the fall of 1984. After Fineman threatened to sue Stern for the additional $4,000 unpaid deposit, Stern voided the letter of intent, threatened to report TINS to the Connecticut Commissioner of Banking for failing to register under the Connecticut Act, and threatened to counterclaim for the return of Stern's $4,000 deposit. J.A. at 4328-30; 8553-55. TINS and Stern ultimately executed a mutual release of all claims arising out of the letter of intent, in which TINS received $1.00 "and other good and valuable consideration." J.A. at 8556-58; 8557. This settlement released Stern and its "assigns" without mention of Armstrong.

Armstrong suggests that where two parties to a contract enter into a settlement agreement mutually discharging them from any liability under the contract, one of those parties may not then seek recovery against a third party for tortious interference with that contract. Armstrong has not provided any New Jersey caselaw to support its position and we conclude that the New Jersey Supreme Court would not bar this action.

The New Jersey Supreme Court has evidenced its preference to permit an injured plaintiff the opportunity to settle with one tortfeasor without jeopardizing its ability to seek nonduplicative recovery from another tortfeasor. In *Breen v. Peck*, 146 A.2d 665 (N.J. 1958), involving tortious interference with a brokerage agreement, the New Jersey Supreme Court ruled that the plaintiff could seek recovery against one joint

tortfeasor after settling with the other joint tortfeasor. It rejected the English Release Rule, under which settlement with one tortfeasor precludes subsequent recovery from any other joint tortfeasors, reasoning that that rule shortchanges the claimant and overcharges the person who settles. *Id.* at 668. Adopting a view attuned to encouraging fair settlements, the court in *Breen* ruled that a plaintiff could sue non-settling tortfeasors until full satisfaction was obtained. *Id.* at 672-73. The rationale of *Breen* entitles a plaintiff "to pursue all those who are independently liable to him for his harm until one full satisfaction is obtained." *McFadden v. Turner*, 388 A.2d 244, 246 (N.J. App. Div. 1978).

There is no claim that TINS received full satisfaction from the release with Stern. Whereas TINS threatened suit against Stern for $4,000 (the half of Stern's deposit that had been deferred) and Stern threatened to counterclaim for the $4,000 it had paid, TINS sought much more than $4,000 in lost profits as consequential damages for the destruction of its business as an alleged result of Armstrong's interference. Thus Armstrong's reliance upon *IMAF S.p.A. v. J.C. Penney Co.*, 1991 U.S. Dist. LEXIS 5361 (S.D.N.Y. Apr. 24, 1991) in support of its theory of a bar is misplaced. There the identical damages had been sought against both the breaching party and the tortfeasor, and the court determined that by its own terms the settlement expressly provided that IMAF was fully compensated even though it had not received payment.

Given New Jersey's strong policy in favor of permitting an injured party to seek full recovery from each tortfeasor, we decline to invoke a contrary rule from a different jurisdiction. *See Swift v. Beaty*, 282 S.W.2d 655, 659 (Tenn. App. 1954). We conclude that the plaintiffs are not barred by

the TINS-Stern settlement from bringing their tortious interference claims against Armstrong.

C. *Tortious Interference Claims Under New Jersey Law*

We turn now to the substance of the tortious interference claims, which are governed by New Jersey law. Under New Jersey law, the five elements of a claim of tortious interference with a prospective business relationship are: (1) a plaintiff's reasonable expectation of economic benefit or advantage, (2) the defendant's knowledge of that expectancy, (3) the defendant's wrongful, intentional interference with that expectancy, (4) in the absence of interference, the reasonable probability that the plaintiff would have received the anticipated economic benefit, and (5) damages resulting from the defendant's interference. *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 563 A.2d 31, 37 (N.J. 1989); *see* Restatement (2d) of Torts §766B.

Armstrong does suggest, however, that in a competitive business context a plaintiff asserting a claim of tortious interference must meet a heightened evidentiary requirement akin to the proof required for an antitrust claim. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In the antitrust arena, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (explaining the holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Where a defendant's allegedly illegal activity may stem from either procompetitive or anticompetitive objectives, inquiry must be made to determine whether a permissible inference can be drawn in favor of the plaintiff. *See, e.g., Matsushita*, 475

U.S. at 590 (a twenty-year conspiracy to set predatory prices could not be logically inferred because the losses sustained could never have been recouped); *Monsanto*, 465 U.S. at 765 (an illegal conspiracy to eliminate a competitor could be permissibly inferred on that record). Armstrong asserts that neither federal antitrust nor New Jersey tort laws were intended to stifle competitive activity; thus, a heightened evidentiary standard will provide protection from liability to defendants who simply engaged in the pursuit of legitimate marketplace competition.

Analogizing to antitrust cases, Armstrong alleges that the requirement of "'wrongful' conduct involving 'malice', which is defined as the intentional doing of a wrongful act 'without justification or excuse'" interjects a heightened standard into a tortious interference claim under New Jersey law. Appellee's Brief at 21 (citations omitted). *See Printing Mart*, 563 A.2d at 40 (identifying the pivotal question as whether the defendant's conduct is "sanctioned by the rules of the game"). Armstrong does not cite to any New Jersey caselaw directly supporting its heightened standard of proof, however, and we have found none. Assuming, *arguendo*, that antitrust law requires such a standard, *cf. Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2083 (1992) ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision"), we are not persuaded that it should apply to a New Jersey tortious interference claim. Since the New Jersey courts examining this cause of action in a business context have not articulated a special burden of proof, we hesitate to do so.

Moreover, we do not find New Jersey's cause of action for tortious interference to be unduly hostile to procompetitive conduct in any event. Indeed, the admittedly "amorphus" element of "wrongful, unjustified conduct," is a

flexible standard "and must focus on a defendant's actions in the context of the case presented." *Printing Mart*, 563 A.2d at 40. This standard also includes directions to gauge the defendant's conduct against "the rules of the game." *Id.* As formulated, New Jersey's wrongful conduct element adequately takes into consideration procompetitive conduct.

We reject Armstrong's assertion that "it would be illogical to apply differing legal rules on permissible inferences for antitrust and tort claims where, as here, the *very same conduct* is challenged as both tortious interference and an antitrust violation." Although often applicable to a single dispute, tort and antitrust causes of action require widely divergent proofs. Moreover, these causes of action vindicate widely differing policies; the first is wholly personal to the plaintiff-competitor and the second requires the plaintiff to demonstrate harm to competition at large and antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977). These divergent proofs and purposes readily account for any arguable differences in their standards of proof.

D. *TINS' Reasonable Expectation of Economic Advantage*

Although New Jersey law governs the tortious interference claim, the Connecticut Business Opportunity Investment Act, which requires registration and disclosure for certain kinds of business ventures, bears upon whether TINS could establish the first element of tortious interference: a reasonable expectation of economic advantage arising from TINS' agreement with Connecticut-based Stern. Because neither party challenges the ruling of the district court that New Jersey courts would look to the law of the situs of the contract in making that determination, we will examine the Connecticut Act to determine whether the agreement between TINS and Stern

could have created a reasonable expectation of business advantage.

The district court held that the Connecticut Act applied to TINS and that because TINS had not registered with Connecticut's Banking Commissioner nor made other efforts to comply with the Act, the TINS-Stern letter of intent was void as a matter of public policy. Therefore it would have been unenforceable by TINS and could not support a claim for tortious inference with that prospective contract against a third party. The plaintiffs claim that the district court erred when it applied the Connecticut Act to defeat, as a legal matter, TINS' reasonable expectation of economic benefit in the Stern-TINS letter of intent.[11] In this appeal TINS raises only two discrete arguments with respect to the application of the Act; therefore, we will only consider those two issues.

1. *The Connecticut Business Opportunity Investment Act*

The Connecticut Act, effective in 1979, was enacted to prevent misrepresentations and fraudulent practices in business opportunity investment sales. Brian J. Woolf, *Connecticut Business Opportunity Investment Act: An Overview of Its Regulatory Requirements and Its Interface with the Federal Trade Commission's Rule Entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity*

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[11] The plaintiffs also assert on appeal that the district court erred in resolving the issue of the application of the Connecticut Act because of the invited error doctrine involving Armstrong's proposed jury instructions. We find that because Armstrong had consistently contended that the Connecticut Act barred any claim for tortious interference, this legal issue was consistently preserved. Thus we decline to address the invited error doctrine in this instance. In any case, because the Connecticut Act issue is likely to arise during a new trial, we will address it now.

Ventures", 54 Conn. Bar J. 415 (1980) (hereinafter "*Overview*"). In enacting the statute, the Connecticut legislature sought to regulate "business opportunities" that may be peddled by "high pressure salesmen who flash in and out of motel rooms and are gone before an investor knows he's been fleeced," *id.* at 416 (quoting 12 *Continental Franchises Rev.* No. 10 at 1 and 2 (June 11, 1979)), by requiring "sellers" of "business opportunities" in Connecticut to register with the Connecticut Banking Commissioner and provide disclosure of specified information to prospective "purchasers-investors." A "business opportunity" is defined as:

> . . . the sale or lease, or offer for sale or lease of any products, equipment, supplies or services *which are sold or offered for sale to the purchaser-investor for the purpose of enabling the purchaser-investor to start a business*, and in which the seller represents . . . [C] that the seller guarantees, either conditionally or unconditionally, that the purchaser-investor will derive income from the business opportunity which exceeds the price paid for the business opportunity; . . . or [D] that upon payment by the purchaser-investor of a fee or sum of money which pursuant to the terms of the contract exceeds one hundred dollars to the seller, the seller will provide a sales program or marketing program which will enable the purchaser-investor to derive income from the business opportunity which exceeds the price paid for the business opportunity, . . . "Business opportunity" does not include the sale of

> an on-going business where the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not for profit sale of sales demonstration equipment, materials or supplies, for a total price of five hundred dollars or less to any one person.

Conn. Gen. Stat. § 36-504(6) (emphasis added).

A seller who fails to register under the Act is prohibited from selling business opportunities within Connecticut.[12]

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[12] The Act specifically provides that:

> No person shall in connection with the sale or offer for sale of a business opportunity: (1) sell or offer for sale a business opportunity in this state or from this state unless it has first been registered with the Commissioner and declared effective by the Commissioner in accordance with the provisions of § 36-505; (2) represent that the business opportunity will provide income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earnings potential and discloses this data to the prospective purchaser-investor at the time such representations are made; . . . (5) make any claim or representation in advertising or promotional material, or in any oral sales presentation, solicitation or discussion between the seller and a prospective purchaser-investor, which is inconsistent with the information required to be disclosed by this chapter; (6) directly or indirectly (A) employ any device, scheme or artifice to defraud, (B) make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or (C) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Conn. Gen. Stat. § 36-510.

The Act also affords prospective protection and retrospective avenues of relief for a purchaser-investor of a business opportunity. For example, at a specified time prior to the sale of a business opportunity, the seller must disclose specific information to the purchaser-investor including a financial statement. Conn. Gen. Stat. § 36-506. In addition the Act requires that the seller document any representations of potential profits. Woolf, *Overview*, *supra*, at 427. Retrospective avenues of relief afforded an injured purchaser-investor include both civil and criminal remedies. *Id.* at 429-30. Specifically, an injured purchaser-investor may sue for recovery of damages including attorneys' fees or may bring an action against a bond or trust account which is a prerequisite for registration for certain sellers. Conn. Gen. Stat. § 36-517(a), (b), (d).

If the seller has violated the Act by failing to disclose, to perform, or by making misrepresentations, the Act expressly makes voidable at the purchaser-investor's option any contract entered into by a seller:

> If a business opportunity seller . . . fails to give the proper disclosures in the manner required by § 36-506 . . . then within one year of the date of the contract, upon written notice to such business opportunity seller, *the purchaser-investor may void the contract* and shall be entitled to receive from such business opportunity seller all sums paid to such business opportunity seller.

Conn. Gen. Stat. § 36-517(a) (emphasis added).

2. *The Void-Voidable Distinction*

TINS contends that the Connecticut Act operates only to make voidable, at the purchaser-investor's option, a contract in violation of the Act's requirements. TINS argues that the district court improperly negated the distinction between void and voidable contracts under the Act in holding that the TINS-Stern letter of intent constituted a contract void as against

the public policy enshrined in the Connecticut Act. The district court acknowledged that the Connecticut Act gives the purchaser an option to void the contract with a seller who failed to comply with the Act's requirements. *Fineman*, 774 F. Supp. at 241. According to the district court, "the Connecticut Act specifically treats a contract voided at the option of the buyer as a void contract by eliminating all claims based thereon." *Id.* Thus it ruled that, lacking an *enforceable* economic expectation as a matter of law, TINS did not prove the requisite reasonable expectation of business advantage because Stern voided the letter of intent.

New Jersey law, which we apply to the claim of tortious interference, clearly provides that voidable contracts may still afford a basis for a tort action when the defendant interferes with their performance. *Harris v. Perl*, 197 A.2d 359, 363 (N.J. 1964). Given this rule, TINS' tortious interference claim against Armstrong is not defeated simply because Stern withdrew and voided the letter of intent. The facts of this case clearly demonstrate the wisdom of this rule; otherwise a third party could easily insulate itself from liability for its tortious acts.

The Connecticut Act implicitly distinguishes between voidable and void contracts. It eliminates all claims *of the seller*, rather than "all claims" as the district court inferred:

> No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any regulation or order adopted or issued under this chapter, or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any cause of action on the contract.

Conn. Gen. Stat. § 36-517(h). While this provision might have precluded TINS from enforcing the letter of intent against Stern, it would not have precluded Stern from enforcing the letter of intent against TINS had Stern so wished. Supporting this

construction of the Connecticut Act is section 36-517(i), which is the sole provision declaring a contract void:

> Any condition, stipulation or provision binding any person acquiring any business opportunity to waive compliance with any provision of this chapter or any regulation or order adopted or issued under this chapter is void.

If the incipient contract was not void but merely voidable at Stern's option, then it would not be impossible, as a matter of law, to prove that TINS could have reasonably expected Stern to carry out the contract. Although there was evidence that Stern had independent reasons to cancel the agreement, TINS presented evidence from which a jury could disbelieve those reasons and conclude instead that Stern's cancellation of the TINS program resulted from Armstrong's pressure. Stern's power to avoid the contract without legal liability would be irrelevant to TINS' economic expectations if, as the jury might have concluded, Stern lacked any independent intention of backing out of its agreement with TINS.

As nothing in the Connecticut Act would have precluded Stern from enforcing the letter of intent against TINS, and TINS has proffered sufficient evidence, if believed by a jury, that Stern voided the contract as a result of Armstrong's tortious interference, the Connecticut Act may not be applied to defeat the element of TINS' reasonable expectation of business advantage. Because the Connecticut Act did not deprive TINS as a matter of law of all expectations of economic gain, the district court erred in holding that TINS failed to prove a reasonably expected economic benefit.[13]

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[13] Because application of the Connecticut Act does not preclude TINS' recovery, we need not address TINS' second contention, that the Act does not apply at all.

E. *Sufficiency of the Evidence of Tortious Interference*

The district court granted judgment notwithstanding the verdict on TINS' tortious interference claim, reasoning that the record lacked sufficient evidence of wrongful conduct by Armstrong and causation. While the plaintiffs' evidence is less than overwhelming, *see infra* at Part V.B., we do find that the plaintiffs have produced that minimum quantum of evidence necessary to withstand a motion for judgment n.o.v.

We apply a plenary scope of review to a judgment n.o.v. In so doing, we must be especially vigilant to keep foremost the question whether there is sufficient evidence of record to sustain the verdict of the jury. *Acosta*, 717 F.2d at 841-42. Reviewing the record in the light most favorable to the non-moving party, judgment n.o.v. may not stand "unless the record is 'critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 921 (3d Cir. 1986) (citations omitted); *see also Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961 (3d Cir. 1988). We must refrain from passing judgment on credibility issues; our task is to examine the record dispassionately for any evidence from which the jury may have rendered its verdict.

It is axiomatic that this scope of review requires that we draw all reasonable inferences in favor of the non-moving party, here the plaintiffs. Because the plaintiffs offer little direct evidence in this case, we are called upon to evaluate the reasonableness of inferences that may be drawn from circumstantial evidence. Adding to this already complex task, the plaintiffs seek to strengthen their largely circumstantial case with a theory that includes Armstrong's counsel in a conspiracy with Armstrong and Stern to cover-up their alleged wrongdoing.[14] The plaintiffs seek not only to discredit the

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[14] Among other attacks, plaintiffs' trial counsel -- no longer counsel before this court -- sought to attribute inconsistencies and alleged inconsistencies in defense witnesses' depositions and trial testimony to counsel's coaching; we note that he caused the court to interrupt the progression of the trial prior to Armstrong's summation by alerting securities analysts to the pendency of this lawsuit and the "probability of a multimillion

credibility of Armstrong's witnesses and the defense's theory of the case, but actually to substantiate their case by decimating the credibility of Armstrong's counsel. In light of this situation, we realize our obligation to ascertain at each step of the way whether the plaintiffs have offered sufficient "affirmative" and "concrete evidence" to defeat judgment n.o.v. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "[D]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984); *see also Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).

At trial, TINS portrayed Stern as a financially vulnerable company that was highly dependent upon Armstrong, who supplied Stern with 100 percent of its resilient inventory, and whose products contributed 90 percent of Stern's total revenue. J.A. at 4359-60. *But see* J.A. at 3022 (60-70% of Stern's resilient business was comprised of Armstrong products; 80-85% of Stern's total business derived from Armstrong). It is undisputed that Stern had undergone substantial growth preceding its involvement with TINS and was suffering from undercapitalization. As a result, Armstrong's credit department in Lancaster had listed Stern as a "risk" account from March through November of 1984, J.A. at 7519-57, had placed a lien on Stern's inventory in November of 1983, J.A. at 7557; 7563-68, and requested of Abrahamson a personal guarantee on all materials ordered from March of 1984 onward. J.A. at 7559. It is undisputed that Abrahamson did not give this personal guarantee until sometime in 1985.

Against this backdrop, on May 24, 1984, Fineman approached Abrahamson to distribute the TINS magazine and suggested that Stern could make significant additional profit from the venture. Fineman promised Stern royalties of $29,000

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dollar plaintiffs' verdict" because he believed Armstrong and its lawyers had improperly failed to disclose this information.

in the first year[15] and profit on additional sales generated by the tag advertisements at about 10 to 15 percent of Stern's $11 million annual sales. J.A. at 2517. Fineman testified that Abrahamson acted enthused about the TINS magazine and interested in the possibility of hiring CFIPS to perform consulting work as well. After negotiations, Abrahamson paid one quarter of the $16,000 distributor fee established by TINS and signed the letter of intent.

Following this meeting, TINS' Director of Distributor Relations, Carolann Arena, furnished Stern with a "critical step list" outlining actions that Stern needed to take prior to and during the program "launch," the four to six week sales blitz by distributors' salesmen to their retail customers. Although Stern fulfilled some of those steps, for example by ordering video equipment from RCA on May 31, the plaintiffs alleged it failed to follow through on others. They note that Abrahamson had not arranged for a local production studio to film Stern's monthly tag nor had Stern's sales force made appointments to present TINS to their retailers prior to the sales training. This greatly concerned Arena, who testified that no other distributor had disregarded these steps, and consequently she telephoned Abrahamson on several occasions between the

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[15] This figure comports with Abrahamson's testimony that he expected to recoup the cost of the distributor fee of $16,000 within six months. J.A. at 4290. Although $29,000 was promised to Abrahamson, the record is cloudy as to how Fineman made the calculation. As will be detailed in some length in Part V.B. when we deal with the district court's grant of a new trial for the reason that the verdict was against the weight of the evidence, the record evidence casts doubt upon this rosy projection of $29,000. For example, charter distributors who had signed on before the settlement agreement received royalties of $8 per videotape sold. However, this royalty had been reduced to $5 by the time TINS was offered to Stern. J.A. at 2513. Fineman also testified that he estimated Stern would sell 200 subscriptions and Abrahamson more optimistically calculated 300. The $29,000 in promised royalties, however, appears to be rounded up from ($8/videotape) (12 months) (300 subscribers) = $28,800. J.A. at 2515. Fineman was not able to account for this discrepancy. Moreover, Fineman conceded that TINS distributors' salesmen had each averaged 11 subscriptions prior to the solicitation of Stern. Thus, given Stern's sales force of 13, a more reliable estimate of potential subscriptions might have been 143 rather than Fineman's 200, *see* J.A. at 2517, resulting in annual royalties of $8,580 or ($5) (12 months) (143 subscribers).

end of May and June 20th to discuss these "critical steps." J.A. at 8594-8601. Armstrong countered that Stern had complied with TINS' written instructions: 1) Stern salesmen planned to make appointments with their retailers on the Saturday, June 23, prior to the launch, and 2) because the critical step list specified that production studio arrangements were to be made *during* the launch, Abrahamson was not derelict in his responsibilities to TINS by Friday, June 22.

On June 5, 1984, Abrahamson and his three sales managers, Fischer, Owen and Cloud, traveled to TINS' Paramus, New Jersey headquarters for the shooting of their first TINS tag, which was to be placed at the end of the demonstration tape that Stern's salesmen would show potential retail subscribers during the sales launch. On their tag, the Stern people read scripted lines from a teleprompter that had been provided by TINS in which they portrayed Stern as an "exclusive" TINS distributor for their territory. *See* J.A. 7271-72. Fineman, Arena, and Gail Ferrar, vice president of TINS, all testified that the Stern group was shown the June 1984 edition of the TINS magazine during that visit and that they reacted positively to it. J.A. at 4296; 8677; 8593; 3512-14. To the contrary, Armstrong witnesses Abrahamson and Fischer testified that they viewed a TINS demonstration tape but deny having seen an actual edition of the TINS magazine at that time. J.A. at 4296; 5006. The trip was otherwise uneventful and the Stern group filmed its tag and returned to Connecticut.

A crucial event in the alleged conspiracy between Stern and Armstrong took place just two days later on June 7, 1984, when Abrahamson met with his Armstrong district managers for the resilient division, Robert Roth, and carpet division, Robert Guzinsky, to discuss ways in which to increase Stern's profitability. During that meeting, Abrahamson mentioned that Stern had signed up to distribute the TINS magazine. J.A. at 4300. Guzinsky, who had written a previous memorandum describing TINS, asked "What is it?" J.A. at 4055. Abrahamson described the TINS concept. Guzinsky remarked that it "sound[ed] like a good idea," and expressed interest in obtaining video equipment from RCA at the discounted price. J.A. at 4048; 4302. Roth's comment is reflected in the following exchange:

> Q: Did you say to him Alan, I don't think this makes a lot of sense in the Armstrong scheme of things, given the fact that we do have our own video program that can help you increase your profitability, that type of thing?
>
> [Roth]: That's probably what I said because we have an overlap program.

J.A. at 4085. Abrahamson then explained that TINS filled a void in the Armstrong program. All parties to the meeting agree that the discussion of TINS lasted no more than ten to fifteen minutes and Abrahamson did not recall any threat from Roth about Stern's participation. J.A. at 4301; 3052. TINS argues that Roth's comment violated the settlement agreement between TINS and Armstrong and supports a reasonable inference that Armstrong exercised improper influence and pressure upon Stern to withdraw from its agreement with TINS.

TINS also suggested that a scheduled golf date between Abrahamson and Roth provided another opportunity for Roth to discourage Abrahamson from following through with TINS. Abrahamson's calendar indicates that he had planned to play golf with Roth on the following day although both Abrahamson and Roth denied playing golf. J.A. at 4298; 4050.

On June 12, 1984, James Humphrey, Armstrong's general manager of sales and marketing for the floor division, issued the following memorandum to Armstrong's district managers, which was marked "confidential:"

> [W]e are not in a position to evaluate the effectiveness of the TINS program; however, we feel that since all Armstrong wholesalers are not involved in the program, it would be improper [for] Armstrong to participate in the system. Therefore, if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer

> any assistance. You should make sure that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong.

J.A. at 7323. TINS posits that this memorandum violated the terms of the TINS-Armstrong settlement agreement and sent a negative message to Armstrong distributors regarding TINS.

The TINS training of the Stern sales force began on Wednesday afternoon, June 20, 1984 and continued, as scheduled, until Friday, June 22. Prior to commencement of the Wednesday session, TINS' representative, John Wolfe, requested that Abrahamson add to the sales commission, or "spiff," that TINS planned to offer Stern's sales force as an incentive to sign up more than five subscribers. J.A. at 4649. Abrahamson initially declined a proposal to contribute $20 toward a $50 spiff, which Wolfe testified was unusual, J.A. at 2273-75, but sensing his sales force's enthusiasm, Abrahamson softened and offered to pay $15 out of a $50 spiff to which Wolfe agreed. J.A. at 2355-58; 4307. According to Wolfe, Abrahamson explained to him that Stern was not receiving support from Armstrong. J.A. at 2277. The sales force was also shown a TINS "demo tape," with which the sales force was pleased. J.A. at 4652. That evening, Wolfe showed some examples of distributor tags to Abrahamson and the managers. J.A. at 4308.

The following day, on Thursday, June 21st, Wolfe designated most of the day for training the sales force to sell retailers on the TINS program. This pitch included teaching Stern's sales force scripted responses to overcome potential objections and concerns of solicited retailers. Wolfe characterized Thursday as a "typical, strong day." J.A. at 2278. Even by Abrahamson's account, the Stern sales force seemed "very positive." J.A. at 4309; *see also* J.A. at 4653-54. Following the session, at 6:00 p.m., Wolfe played the June 1984 edition of the TINS magazine for Stern's sales force. After the showing, Stern's resilient manager Fischer warned Wolfe that he could anticipate questions the next day concerning the quality of the TINS magazine. J.A. at 2366; 5011-12.

That evening, per TINS' standard operating procedure, Stern's sales force and managers had arranged to meet at a restaurant for dinner and then to retire to a motel in order to practice roleplaying for the next day's session. Abrahamson testified that he joined the group at the restaurant but departed after being asked to leave so that the sales force could candidly discuss TINS. J.A. at 4311; 5012.[16]

On Friday morning the sales training resumed, although Wolfe testified that Stern management no longer demonstrated involvement at that point. J.A. at 2279. The sales force raised concerns about the quality of the TINS magazine, but Wolfe characterized these as the usual sort of jitters, "maybe more apprehension than normal, but nothing earth-shattering." J.A. at 2280-81. Wolfe responded to each concern in accordance with the TINS script; the sales force appeared to be satisfied and to regain their enthusiasm. One salesman, Phil Parizeau, even opined that TINS had "tremendous value." J.A. at 2282-88.

One item outside the TINS script did arise that Friday morning, however, when Abrahamson demanded a non-negotiable, unconditional money back guarantee from TINS that Stern could offer to any unsatisfied retail customer. Wolfe and his assistant Paul Donofrio explained that they were not authorized to grant that request and, anxious to resume the seminar, Wolfe dodged the issue at that moment. J.A. at 5016-18. However, later, during the training seminar when the managers were not present, Wolfe represented to the sales force that if anyone had a problem with TINS, he could call Wolfe or Donofrio and either one would personally address those concerns and guarantee that customer's satisfaction -- "whatever it took." J.A. at 2287; 2381-82. Wolfe promised the sales force "satisfaction guaranteed" and "conditional money back," J.A. at

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[16] TINS suggests that "this restaurant story was simply concocted by Abrahamson both to reinforce his claim that the sales force opposed the program, and to distance himself from responsibility." Appellants' Brief at 16. A Stern employee, McGuire testified that he did not see Abrahamson at the restaurant at any time, J.A. at 5362, although there is evidence that the layout of the restaurant in several small rooms could account for this inconsistency.

2379-83, but he admitted that he made no such promise to Abrahamson directly. J.A. at 2385-86.

Late in the afternoon, after the sales force had met with Stern's management, Wolfe and Donofrio met with Stern's management for the last time. Abrahamson informed Wolfe, to his complete surprise, that TINS was "dead in the water" and Stern was withdrawing from the program. J.A. at 2293; 2385. Initially, Abrahamson provided two reasons: 1) lack of a money back guarantee and 2) his sales force's dissatisfaction with the program. J.A. at 4327. As Wolfe responded to each concern, Abrahamson voiced additional reasons. For example, Abrahamson explained that the sales force had been disappointed in the quality of the TINS magazine; Wolfe responded that one needed to evaluate the cumulative effect of a video medium. To address Abrahamson's concern that the program demanded too much managerial time, Wolfe responded that it would increase efficiency in the long run. J.A. at 2297-99. Abrahamson continued with a host of reasons until Wolfe despaired of winning him over. After approximately two hours, the meeting ended and Wolfe and Donofrio returned to New Jersey.

The following day, Fineman telephoned Abrahamson at his home and entreated him to reconsider his decision and even tried to entice Abrahamson with free CFIPS services to sweeten the deal. Abrahamson remained adamant and Fineman testified that Abrahamson indicated during their conversation that certain specials would not be made available to Stern by Armstrong. J.A. at 1908; 1911.

Viewing this evidence in the light most favorable to the plaintiffs, we conclude that TINS produced that minimum quantum of evidence required to sustain the jury's verdict. From the evidence produced at trial, the jury could draw an inference that Armstrong disapproved of its distributors engaging in selling the TINS magazine because it was several years behind in developing an "overlap" program and did not relish future competition for its video network. The jury could also have inferred that Stern's financial fragility led Abrahamson to perceive a threat in Roth's remarks about TINS as an "overlap" program and that Stern's financial dependence on Armstrong

made Stern particularly susceptible to coercion. The jury may have inferred that Abrahamson's enthusiasm for TINS cooled after the June 7th meeting with Roth, as evidenced by Abrahamson's failure to procure a local production studio and the sales force's failure to make appointments with retail customers in advance of their training seminar. Given these inferences, the jury may also have disbelieved Armstrong's voluminous evidence that Stern's enthusiasm was chilled after viewing the June edition of TINS on Thursday evening and instead credited the plaintiffs' testimony that Stern management had viewed and enjoyed that edition of the TINS magazine on June 5th. Thus, the jury could have disbelieved that Abrahamson put the matter to a vote and followed the consensus, choosing rather to infer that Abrahamson simply trumped up a number of excuses and attempted to distance himself from responsibility for the decision.

F. *Fineman's Individual Tort Claim*

We must next address whether Fineman may maintain an individual claim for tortious interference under the theory that Armstrong's alleged destruction of TINS damaged beyond repair Fineman's reputation as a floor covering industry consultant. The district court granted judgment n.o.v. on this claim, reasoning first, that it suffered derivatively from the same insufficiency of the evidence as TINS' tortious interference claim and alternatively, that Fineman had failed to prove "either directly or by permissible inference, that Armstrong specifically intended to injure Fineman in his individual capacity when it allegedly interfered with the Stern/TINS relationship." *Fineman*, 774 F. Supp. at 250.

Assuming for purposes of this discussion that Fineman has produced, as he claims, sufficient evidence upon which to find that Armstrong specifically intended to drive Fineman out of the consulting business, *see* Restatement (Second) of Torts §766, comment p (requiring specific intent to injure a third-party plaintiff); *Printing Mart*, 563 A.2d at 37 (noting substantial similarity between the Restatement's and New Jersey's formulation of the tort), we conclude as a matter of law that Fineman has failed to prove an additional element of tortious interference with a prospective contractual relation,

namely, a sufficiently concrete prospective contractual relation.

Printing Mart, a case in which the New Jersey Supreme Court carefully delineated the elements of a tortious interference claim, makes clear that a plaintiff must establish injury to a prospective economic relation from the defendant's tortious interference. 563 A.2d at 38-39.[17] Even accounting for the distinction between that case and this -- in *Printing Mart*, the plaintiffs were parties to the contract (i.e., in TINS' position rather than Fineman's) -- we conclude that a third party to the contract must also establish with reasonable certainty a prospective economic relation in order to state a claim for tortious interference under New Jersey law. This Fineman has failed to do.

"Prospective economic relation" is broadly defined under New Jersey law:

> The expression, prospective contractual relation, is not used in this Section in a strict, technical sense. It is not necessary that the prospective relation be expected to be reduced to a formal, binding contract. It may include prospective quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation.
>
> * * * * *
>
> Included are interferences with the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and

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[17] The parties have not suggested, nor have we been able to find, any New Jersey cases addressing a claim for tortious interference brought by a plaintiff who was not a party to the contract. Assuming without deciding that New Jersey would permit such a claim, we must determine whether this record supports Fineman's individual claim.

> any other relations leading to potentially profitable contracts.

Printing Mart, 563 A.2d at 39 (quoting the Restatement (Second) of Torts §766B, comment c). Arguably, the relevant prospective economic relation would be Stern's letter of intent with TINS. However, Fineman's individual claim rests upon losses sustained in his consulting business. Because his individual claim is premised upon injury to future consulting, it is equally appropriate to require Fineman to prove sufficient prospects for consulting contracts after the summer of 1984 when Armstrong allegedly coerced Stern into voiding its letter of intent with TINS.

The record is critically deficient with respect to Fineman's future consulting prospects. Although the record was replete with evidence of Fineman's fine reputation as an industry consultant, it was devoid of objective evidence that Fineman had any concrete plans for future consulting work. Fineman's consulting was conducted solely under the aegis of the CFIPS organization and on this record we are unable to find evidence of CFIPS's future consulting prospects. CFIPS disbanded shortly after TINS came to life, in part due to the departure of one of its primary consultants, Ron Friedman, which was unrelated to this litigation, and the fact that the rest of the CFIPS staff, including Fineman, Ferrar and Arena, redirected their attention to TINS exclusively. J.A. at 8814-15. By Fineman's own admission, CFIPS did not acquire any new clients after 1983, J.A. at 2614, nor did it sell consulting services to any clients in 1984. J.A. at 2993. Fineman's hope that TINS' eventual success would drum up later business for CFIPS amounts to speculation given the lapse of the CFIPS consulting business in 1984.

Because Fineman has failed to demonstrate a reasonable prospect of future consulting business in the floor covering industry, his individual claim for tortious interference with contract fails as a matter of law.

G. *Punitive Damages*

We turn finally to address whether the district court properly granted judgment n.o.v. on the jury's award of punitive damages. We note that since we are affirming the judgment n.o.v. on Fineman's *individual* tortious interference claim, the judgment n.o.v. on his punitive damages follows suit. Nonetheless, with respect to TINS, this issue may arise upon retrial, so we will address its merits. The parties specifically dispute whether Armstrong's conduct rises to that level of misconduct subject to punitive damages. Although the jury awarded punitive damages in the amount of $200 million, the district court found as a matter of law that the record is "critically devoid of that quantum of evidence as to the wrongfulness of the alleged conduct under the legal standard governing such awards." *Fineman*, 774 F. Supp. at 254.

Under New Jersey law, punitive damages "can be awarded to punish [a defendant']s aggravated misconduct" and to deter similar misconduct in the future. *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1230 (N.J. 1984) (citations omitted). The New Jersey Supreme Court has made clear that punitive damages may only be awarded where the wrongful conduct underlying tort liability exceeds the minimum threshold for a finding of liability. *Berg v. Reaction Motors Div.*, 181 A.2d 487 (N.J. 1962). There the court articulated that the commission of a tort will not alone justify the imposition of punitive damages regardless of whether the tort be grounded on strict liability or fault. *Id.* at 496. As explained in *Berg*, which involved a nuisance:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton. Lacking this element,

> mere negligence, however 'gross,' is generally held not to be enough.

Id. (citing Prosser, Torts, 9-10 (2d ed. 1955)). The prerequisite misconduct "may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *Id.*

When assessing punitives attending an intentional, rather than a negligent tort, the New Jersey Supreme Court has termed the prerequisite misconduct as "actual malice," defined as "nothing more or less than intentional wrongdoing -- an evil-minded act . . . ." *Belinski v. Goodman*, 354 A.2d 92, 94 (N.J. Super. 1976) (citation omitted). In *Belinski*, which involved a claim of tortious interference with a brokerage agreement, the court concluded that evidence demonstrating the defendant's "low moral fibre" and motivation to commit the tort were relevant to the defendant's degree of actual malice. *Id.* at 95; *see also Di Giovanni v. Pessel*, 260 A.2d 510, 512 (N.J. 1970) (the defendant-doctor's failure to sign a certificate for confinement before a notary resulting in false imprisonment of the plaintiff lacked not only the prerequisite actual malice but failed even to equal wanton and reckless disregard).

The parties focus upon whether the evidence of Armstrong's wrongful interference with the TINS-Stern agreement alone suffices to prove the prerequisite misconduct for punitive damages. TINS contends that the legal malice necessary for proof of liability satisfies the actual malice prerequisite for punitive damages; understandably, Armstrong differentiates between the two. We cannot discern a clear rule under New Jersey law on this point. Indeed, it appears to be an unanswered question. *See Nappe*, 477 A.2d at 1237 n.3 (O'Hern, J., concurring) ("The majority says 'it is especially fitting to allow punitive damage [sic] for actions as legal fraud, since intent rather than mere negligence is the requisite state of mind'" (citation omitted) . . . "whether the threshold for punitive damages should be identical to that for compensatory damages is exactly the type of question we should resolve and not leave to the discretion of juries").

Nevertheless, if TINS' theory is believed by the jury, then we conclude that TINS would be entitled to a jury charge on punitive damages upon retrial. Giving TINS the full benefit of every possible inference, the record supports a finding of actual malice in excess of the legal malice necessary for tortious interference. Because we need not, upon this factual record, reach the legal question unanswered by the New Jersey Supreme Court, we decline to predict whether New Jersey would rule that as a matter of law, the wrongful and intentional conduct necessary for tortious interference would, as a matter of law, entitle a plaintiff to punitive damages.

Taken in the light most favorable to TINS, the evidence suggests sufficient actual malice or "an evil-minded act." Aware of TINS' precarious financial position from Fineman's disclosure during the 1983 settlement negotiations, Armstrong recognized its opportunity to disrupt TINS' recovering, or to eliminate TINS entirely by destroying TINS' agreement with Stern. Armstrong accomplished this by wielding both the general authority it exercised over its captive distributors and by applying more specific coercive pressure, available because of Stern's precarious financial position. Actual malice is especially present here because of the history of this dispute; the jury could have found that despite a settlement agreement, Armstrong flagrantly disregarded its continuing obligations under the settlement agreement and deliberately reactivated its plan to clear out any competition for its future video network plans. Giving TINS the benefit of every possible inference, a jury could find that the record demonstrates that Armstrong harbored sufficient actual malice to award punitive damages. Thus we hold that the district court erred in granting judgment n.o.v. on TINS' punitive damage award.

IV. Sherman Act Section 2

A. *Elements of a Leveraging Claim*

Section 2 of the Sherman Act makes it unlawful for "[e]very person [to] monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . ." 15 U.S.C.A. § 2 (West Supp. 1992). This case presents

both monopoly and attempted monopoly claims under section 2. We are called upon to evaluate whether the district court properly granted judgment n.o.v. for Armstrong on TINS' Sherman Act section 2 claims that Armstrong employed monopoly power in the resilient product market to "perpetuat[e] said monopoly and for the purpose and with the effect of attempting to monopolize the relevant [resilient and video magazine] markets . . . ." Compl. at ¶¶ 31, 32.

To prove a monopoly claim under section 2, TINS must show: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). To succeed on its claim of attempted monopoly, TINS must show that Armstrong possessed both specific intent to monopolize the video market and sufficient market power to create a dangerous probability of success. *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *see also American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946).

TINS premised both of its section 2 claims upon a leveraging theory, alleging that Armstrong employed monopoly power in the alleged resilient product market to gain a monopoly, or a dangerous probability of a monopoly, in the relevant video product market. Prior to submission of the case to the jury, TINS sought to alter its case theory to obviate its need to prove a resilient monopoly power lever, by challenging the district court's ruling that the section 2 claim requires proof of "the alleged relevant market or sub-market for resilient floor covering alone" and second, "proof that in 1984 Armstrong possessed monopoly power in such alleged resilient market or sub-market." J.A. at 650-51.

Our review of a district court's ruling on points for charge is conducted under an abuse of discretion standard. *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987). In this instance, the district court did not abuse its discretion in declining to permit a dramatic change in TINS's theory of the case at the end of trial. As the district court accurately noted,

(Armstrong) *intended* to affect Fineman's contractual relations with others, i.e. his consulting clients.

Comment h to s 767, to which comment p above refers, provides in relevant part as follows:

> *h. Proximity or remoteness of actor's conduct to interference.*
>
> If, however, A induces B to sell certain goods to him and thereby causes him not to perform his contract to supply the goods to C, this may also have the effect of preventing C from performing his contractual obligations to supply them to D and E. C's failure to perform his contracts is a much more indirect and remote consequence of A's conduct than B's breach of his contract with C, even assuming that A was aware of all of the contractual obligations and the interference can be called intentional. This remoteness conduces toward a finding that the interference was not improper. The weight of this factor, however, may be controverted by the factor of motive if it was the actor's primary purpose to interfere with C's obligation to D and E, or perhaps by the factor of the actor's conduct if that conduct was inherently unlawful or independently tortious. Similar results follow in cases in which the person whose contract was the subject of the initial interference has contracts of his own with his employees, his subcontractors or

his suppliers,' which he is now unable to perform.

In *Glass Bottle Blowers Ass'n v. National Bottle Co.*, 584 F. Supp. 970 (E.D. Pa. 1983), plaintiff union filed an action under Pennsylvania law[21] against National Bottle, the employer of its members, asserting several claims. Plaintiff also asserted a claim for tortious interference with contract against First Pennsylvania Bank, claiming that the Bank's actions as a creditor caused National to be unable to perform under the collective bargaining agreements. The Court dismissed the complaint as to First Pennsylvania, and then various of the other defendants filed a third party complaint against First Pennsylvania asserting a tortious interference claim. These other defendants asserted that if they were found liable for National Bottle's acts, then they would be entitled to recover from First Pennsylvania for tortious interference.

The court dismissed this complaint because, as a matter of law, the allegations did not support the claim. Specifically, the only one who could recover under tortious interference with contract was the Union, not these defendants/third-party plaintiffs, since they were not parties to the contract interfered with. (584 F. Supp. at 972 (quoting *Restatement (Second) Torts* § 766 and Comment p)).

Norwood Easthill Associates v. N.E. Watch., 222 N.J. Super. 378 (App. Div. 1988) is a recent case exploring New Jersey's rules concerning tortious interference with contract. While it does not address the precise issue at hand, it is useful for its summary of the necessary elements of the cause of action. Plaintiff was a partnership which entered into a *252 contract with the Borough of Norwood for the purchase of land the plaintiff wanted to develop. Later, the zoning ordinance was declared invalid, and so plaintiff and the Borough entered into a settlement agreement. During a public meeting to explain the settlement, defendants (a non-profit group of residents opposing the development) made several threats against the Borough, its

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[21] Pennsylvania and New Jersey both follow the *Restatement (Second) of Torts*.

attorney and the mayor. Thereafter, a court denied approval of the settlement agreement, it was revised, and then finally approved.

Plaintiff brought an action against the defendants for malicious interference with the settlement agreement. The trial court had granted summary judgment to the defendants for several reasons, including the fact that the threats were made against the Borough, not the plaintiff. The Appellate Division disagreed, saying that "[i]f defendants ... sought to affect adversely an agreement *to which plaintiff was a party*, and if such action directly affected plaintiff's rights under that agreement, plaintiff might maintain an action for malicious interference." (222 N.J. Super. at 383) (emphasis added).

Organization of Minority Vendors, Inc. v. Illinois Central Gulf Railroad, 579 F. Supp. 574 (E.D.Ill. 1983), is not a New Jersey case, but does depend on the *Restatement (Second) Torts* and its comments. Plaintiffs were a non-profit organization of minority vendors and black or Hispanic owned businesses. Defendants were several railroads who solicit bids and award contracts for supplies and services. Also named as defendants were several white male owned or controlled vendors who supplied goods and services to the railroads. Plaintiffs asserted numerous causes of action, including a claim for tortious interference with contract. (*Id.* at 605). The Court determined that this count asserted two discrete causes of action. The first was that the white vendors interfered with government funding contracts between the railroads and the federal government by inducing the railroads to breach the affirmative action portions of those contracts. (*Id.*) The second was a claim that the white vendors tortiously interfered with the prospective business opportunities of the minority businesses by causing the railroads to fail to fulfill the affirmative action requirement. (*Id.*)

The court dismissed the first cause of action because "[i]mplicit in this definition [of tortious interference] is the requirement that the plaintiff be a party to the contract." (*Id.*, citing *Restatement (Second) Torts*, § 766 and comment p). In so doing, the court rejected the argument that the plaintiffs were third-party beneficiaries of the funding contracts and

targets of the white vendors' wrongful acts. (*Id.*) "By focusing on the motive and purpose of the wrongdoer rather than rights under the contract courts in a few jurisdictions have suggested that non-parties to a contract singled out for harm by the defendant can sue for the injuries suffered as a result of the defendant's tortious interference with a contract." (*Id.*, citing *DeVoto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980)). The court rejected this view because "[a]ll the relevant precedent suggests that only direct parties to a contract, and not third-party beneficiaries, can maintain a tortious interference action." (*Id.*)

The *Minority Vendors* court did, however, allow the second tortious interference claim to remain. Unlike the first, this action was for injuries caused by interference with the relationship between the minority owners and the railroads. Accordingly, it did not suffer from the same defect as the first cause of action.

The *DeVoto* case cited by the *Minority Vendors* court was an antitrust and tortious interference case. Pacific Fidelity Life Insurance and American Home Assurance Company both sold mortgage protection insurance to mortgagors. (618 F.2d at 1343). Bankers Mortgage Company was in the business of making real estate loans, and was a sister subsidiary of Pacific. Bankers and American had an agreement by which Bankers provided American with a list of the names of mortgagors for a fee and a commission for each policy sold. Pacific persuaded Bankers to end the agreement in order to provide names to it. The suit was brought by two individuals who were responsible for bringing American and Bankers together and who expected to receive agents' commissions on the contract. (*Id.*)

In addition to an antitrust claim, the plaintiffs alleged that the commissions from the Bankers-American agreement were a business advantage lost as a result of Pacific's inducing Bankers to repudiate the contract. (*Id.* at 1346). The Ninth Circuit reversed a jury verdict in favor of the plaintiffs because there was no evidence that Pacific had any motive or purpose to injure these individuals. (*Id.* at 1347). Thus, the question on which the court focused was the requirement of

specific intent to harm the plaintiff. Contrary to the *Minority Vendors* court's reading, the *DeVoto* court did not consider the question of whether a nonparty could seek damages for interference with contract. In fact, the *DeVoto* case can be read to show that a cause of action for the loss of business advantage between plaintiffs and American was valid. (*See id.* at 1347). If so, it appears to be consistent with *Minority Vendors*. As noted above, the Restatement requires at least one of the two elements: specific intent or the status of a party to the contract.

Based on the Restatement and the above cases, it appears that Fineman can collect for the tortious interference allegedly committed by Armstrong only if he has proven that the defendant specifically intended to harm him by interfering with the Sterns-TINS business relationship, since Fineman was not a party to that relationship. Indeed, this Court so instructed the jury based on such precedent. (*See* Jury instructions at 43).[22] In other words, the question is not merely one of foreseeability[23] as the plaintiffs continue to argue. This Court also rejects the defendant's claim that only parties to a contract may sue for its interference. (*See* Defendant's J.N.O.V. Br. at 61- 63). Similarly, this Court does not adopt defendant's argument to limit the claim only to interference with any consulting contract between Fineman and Stern. (*Id.* at 64).

There is sufficient proof in the record for a reasonable jury to conclude that Armstrong knew of Fineman's consulting business. The jury could also reasonably conclude that Armstrong knew about and disliked Fineman's advice to distributors to maintain smaller inventories. Indeed, the jury could even reasonably conclude that Armstrong would foresee that destruction of TINS would harm Fineman's reputation in the industry. The evidence does not, however, either directly or by

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[22] The question of whether Fineman could recover on this claim arose during the course of trial. Accordingly, this Court conducted its own research on the question and eventually requested briefs from the parties. Review of all such information led this Court to the conclusion reiterated here and the jury was instructed accordingly.

[23] Foreseeability is a concept germane to the issue of proximate cause but not determinative of the element of intent to harm.

permissible inference, show any intent on the part of Armstrong to either "get rid of" or otherwise harm Fineman as a consultant.

All of the evidence upon which plaintiffs rely in support of their tortious interference claims refers only to TINS' efforts in the development of its video magazine, and Armstrong's alleged efforts to thwart TINS' business efforts, as described above. The record is completely devoid of any proof that Armstrong acted with the express (or even implied) purpose of eliminating Fineman's consulting opportunities. Armstrong is therefore entitled to J.N.O.V. as to Fineman's individual claim.

This is further supported by the fact that Fineman never conducted consulting in his own name. Rather, his consulting business was conducted in the form of another corporation, CFIPS, which employed others as consultants besides himself. As with Fineman, the record is completely devoid of any intent to harm CFIPS. Thus, even if this Court determined that Fineman was the "alter-ego" of CFIPS (which it does not, and cannot on this record), there is no evidence of a specific intent to harm that corporation.

E. *Punitive Damage Award*

This Court determines that even if the plaintiffs' claim for tortious interference survived the motion for J.N.O.V., the punitive damage award cannot. The record is critically devoid of that quantum of evidence as to the wrongfulness of the alleged conduct under the legal standard governing such awards.

To obtain punitive damages under New Jersey law the plaintiff must prove either "(1) actual malice, which is nothing less than intentional wrongdoing -- an evil minded act; or (2) an act accompanied by a wanton and willful disregard of the rights of another. Clearly, each case must be governed by

its own particular facts."[24] *Berg v. Reaction Motors Division*, 37 N.J. 396, 414 (1962) (quoting *LaBruno v. Lawrence*, 64 N.J. Super. 570, 575 (App. Div. 1960), *certif. denied*, 34 N.J. 323 (1961)); *see also Nappe v. Anschelewitz et al.*, 97 N.J. 37, 50-51 (1984) (same); Jury instructions at 46. The "wanton and willful" requirement is satisfied upon a showing that there was a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences. *Berg*, 37 N.J. at 414. That is, even the second showing requires proof of a "positive element of conscious wrongdoing." (*Id.*)

These standards, however articulated, demonstrate the realization that "only conduct which is particularly egregious will justify an award of punitive damages." *Fischer v. Johns-Mansville Corp.*, 103 N.J. 643, 654-55 (1986). *See also Leimgruber v. Claridge Assoc., Ltd.*, 73 N.J. 450, 454 (1977) ("Punitive or exemplary damages are sums ... assessed when the wrongdoer's conduct is especially egregious." (citations omitted)). In other words, "something more than the mere commission of a tort is always required for punitive damages." *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970) (quoting W. Prosser, *Torts*, § 2 at 9-10 (2d ed. 1955)). Indeed, "mere negligence, however 'gross', is generally held not to be enough." *Berg*, 37 N.J. at 413, 181 A.2d 487 (quoting Prosser, *Torts*, § 369 at 9-10 (2d ed. 1955)).

Generally, punitive damages may be awarded only "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime." *Security Alum. Window Mfg. Corp. v. Lehman Assoc. Inc.*, 108 N.J. Super. 137, 142 (App. Div. 1970) (citing Prosser, *Torts* (3d ed. 1964), § 2, at 9)). *See also Restatement (Second) Torts* § 908, comment b) (same).

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[24] In this portion of the present opinion, when the Court employs the term "malice" in its discussion of whether TINS has proven its punitive damages claim, it does so as an abbreviated reference to either (or both) of the two punitive damages standards stated here.

The proof presented by TINS in support of its claim for punitive damages fails to meet any of these standards. Indeed, none of the evidence provides even a remote basis for a finding that any act of Armstrong was sufficiently malicious, wanton or egregious to warrant an award of punitive damages in any amount.[25]

For example, the plaintiff relies heavily on a memo written by Armstrong's Csrnko on October 20, 1983, particularly on the following paragraph:

> [W]e feel this program conflicts with the future video plans and certainly would not prove to be in our combined best interests.
>
> ... *[I]f you receive any inquiries regarding "TINS", please try to discourage your wholesalers participation* and offer suggestions on how their time could be directed towards a more important Armstrong sales effort. Additionally, please notify me as soon as the offer has been made to your wholesaler. I want to make sure we all stay on top of this competitive effort.

(Px. 5120) (emphasis supplied as provided by the plaintiff, at Plaintiffs' J.N.O.V. Opp. at 16-17). The language of the memo itself refutes an inference of malice of any sort, and certainly does not indicate malice sufficient to warrant imposition of punitive damages. Furthermore, when the entire context of the memo is viewed, it is even clearer that no malicious intent or other outrageous conduct can be derived therefrom:

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[25] The following analysis shows that the plaintiffs are not entitled to any amount of punitive damages. It is, therefore, not necessary for the Court at this point to discuss the separate issue of the amount of punitive damages ($200 million) awarded.

> We obviously feel the "TINS" program will require a considerable amount of selling time on the part of wholesaler salesmen, which could be better utilized selling Crowne Corlon, Glazecraft, Medintech and other Armstrong resilient flooring products.

(Px. 5120). At most, the jury could reasonably find that Armstrong sales personnel were to discourage wholesalers from becoming TINS distributors in order to devote more time to the sale of Armstrong products. The plaintiffs' argument that this memo is evidence of malice is but an invitation to speculation and conjecture.

The plaintiffs have also placed considerable emphasis (aided by emotional rhetoric) on Humphrey's memo of September 12, 1983. (Px. 165). This mildly worded memo, like that of Csrnko, merely suggests that Armstrong retailers be encouraged to use Armstrong's videos rather than TINS'. It is unreasonable, even ludicrous, to suggest that this memo orders Armstrong employees to act maliciously with respect to TINS, as is evident on its face. The language of this memo, as Csrnko's, is couched in terms of a request rather than a mandatory edict. Again, plaintiffs' reliance, in an impassioned plea to the jury, on one phrase taken out of context cannot support an inference that Armstrong acted with malice in urging its wholesalers to concentrate on sales of its products rather than the TINS program.

Similarly unavailing to the plaintiffs' position is the reliance on the Guzinsky memo of September 27, 1983. (Px. 216A). This memo also refers to the fact that Armstrong distributors' time is better spent selling Armstrong products, and states that "we feel [the TINS] program conflicts with our mutual video plans and would not prove to be in our mutual best interest." (*Id.*) Once again, the language of the memo as a whole, rather than emphasis on a single portion, renders improbable and unreasonable any inference of malice.

It is also significant that these memos were written prior to the Settlement Agreement between Armstrong and TINS. The Settlement Agreement extinguished all claims of the plaintiff for wrongdoing allegedly occurring prior to January 12, 1984. Also the passage of time, plus the intervening events in 1984 diminished their weight considerably; no reasonable jury could determine otherwise. Admittedly, evidence from 1983 was allowed by this Court on the basis that it is somewhat probative on the question of Armstrong's intent in 1984, the period of the alleged tortious interference. However, what the plaintiffs fail to recognize is that the memos, when read in their entirety and not through excerpts extracted out of context, simply do not under any reasoned construction amount to evidence of either actual malice or a wanton and willful disregard of TINS' "rights." It is unreasonable to infer from this evidence, as the plaintiff so emotionally begged the jury to do, that Armstrong deliberately and with malice coerced its wholesalers into refraining from participating in the TINS program.

Plaintiffs' reliance on evidence arising after the Settlement Agreement is similarly unavailing. For example, plaintiffs place considerable weight upon evidence concerning the meeting between Roth and Abrahamson on June 7, 1984. *See* the Court's extensive discussion of this meeting at 44-48, *supra*. The plaintiffs are clearly stretching the bounds of reason by suggesting that Roth's brief remark, in the course of a three-hour conference, supports a finding that Armstrong acted with malice. First, the language of the comment itself does not contain a threat, nor any intent of interfering with Stern's decision to become a TINS distributor. Any inference that it does could only be the product of fantasy and speculation. Second, the statement does not constitute a breach of the Settlement Agreement as the plaintiffs have continuously suggested. This Court determined as a matter of law that "Paragraph 4 of the [Settlement] agreement does not place any continuing duty on Armstrong to instruct its representatives not to discuss the TINS program with Armstrong wholesalers." (Summary Judgment Op. at 52). Roth's comment does demonstrate, as a reasonable jury could find, disregard for the edict issued in January, 1984 by Armstrong's headquarters that all requests concerning Armstrong's view of TINS be referred

to Lancaster. Even so, particularly considering the context in which the statement was made, Roth's comment is insufficient to support an inference of conduct so egregious as to warrant an assessment of punitive damages.

The plaintiffs also place considerable emphasis on the fact that the Humphrey memo was issued on June 12, 1984, only 8 days before TINS began its sales program and 10 days before Stern backed out of the deal. It is well-settled, however, that the fact of one event following another does not support an inference of causation. " 'Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do flow from the basic circumstantial facts. ... [A]ssuming a causal connection between two events merely because one follows the other' is insufficient." *American Bearing Company, Inc. v. Litton Industries*, 729 F.2d 943, 952 (3d Cir.), *cert. denied*, 469 (1984) (quoting *Edward J. Sweeney & Sons v. Texaco*, 637 F.2d 105, 116 (3d Cir.1980), *cert. denied* 451 U.S. 911 (1981)). As noted earlier in this opinion, Humphrey's memo had a limited circulation, and the record is devoid of evidence that its contents were ever conveyed to Stern.

Plaintiff's assertion that the June 12, 1984 Humphrey memo allows a reasonable inference that Armstrong acted with malice is misguided as well. The language upon which plaintiff relies is the statement that "if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer any assistance." (Px. 525). Plaintiffs argue that this language constitutes a threat to revoke any and all promotions from any wholesalers who become involved in TINS. Thus, plaintiffs rely on this language as proof of Armstrong's malicious intent to ruin TINS. However, consideration of this language in the context in which it was written refutes any possible inference of malice or wanton misconduct. The language of the memo itself, as a whole, clearly illustrates that the only reasonable inference is that Armstrong was not willing to provide "assistance" in the form of special, additional promotions only to those Armstrong distributors who were also TINS' distributors. *See* this opinion, *supra*, at 48-54. Once

again, plaintiffs' impassioned over-reliance upon language taken out of context is to no avail. No reasonable juror could review this memo and conclude that Armstrong bore any malicious or wanton intent to destroy TINS.

Contrary to plaintiffs' arguments, this Court's summary judgment opinion does not require a different result. In fact, the portion of the Opinion to which plaintiffs refer, page 22, is merely a recitation of the plaintiffs' argument made at the time. It does not reflect this Court's opinion as to the interpretation which should be given to such language. Even if it had, the interpretation suggested by plaintiffs there and here has not been supported by the evidence adduced at trial, and therefore is utterly without foundation.

Furthermore, it is irrefutable that Armstrong had no obligation, whether under the Settlement Agreement or under the law, to provide resources to its wholesalers for use in promoting the TINS magazine. Indeed, it is entirely reasonable and legitimate for Armstrong to require that resources it provides to wholesalers be used only to promote Armstrong products. It is beyond refute that a desire to promote one's own business, standing alone, negates the requisite state of mind required for a finding of maliciousness or wanton misconduct necessary to support an award of punitive damages. *See e.g. Buono Sales, Inc. v. Chrysler Motor Corp.*, 449 F.2d 715, 723 (3d Cir. 1971). It belies common sense and reason to expect one business to actively aid a business which competes, in the sense that TINS' magazine contains advertisements for products manufactured by Armstrong's competitors in the floor covering industry. Accordingly, an inference to the contrary, that is an inference that, from refusal to aid, Armstrong was motivated by a malicious intent to harm TINS, is unreasonable.

This conclusion is further buttressed by the fact that the plaintiffs were fully aware of Armstrong's view that it would not and could not provide favors for those of its distributors who participated in the TINS program. The letter from Draeger to Fineman, attached to the Settlement Agreement, specifically states that "Armstrong cannot, as a matter of policy, recommend a preference for any product which is neither

manufactured nor marketed by Armstrong." (Exh. C to Px. 6001).

The existence of notations of "confidential" related to the June 12, 1984 memo, the Roth-Abrahamson meeting, and Armstrong-distributor agreements does not support a finding of malice either. As noted in section II.C of this opinion, *supra* at 54-56, the term "confidential" arises in three completely unrelated instances and contexts, and therefore adds nothing to the plaintiffs' case. The meeting between Roth and Abrahamson was necessarily "confidential" in light of the broad range of subjects covered by such meeting, most particularly, Stern's financial condition. Similarly, the confidentiality term in distributor arrangements is not rationally linked in any manner to Armstrong's view of TINS or any actions taken with respect to Stern's arrangement with TINS. (*See e.g.* Px. 1244 (Distributorship Agreement between Armstrong and Nelson & Small), at ¶ 11). It is clearly designed to protect sensitive, proprietary Armstrong information to which distributors may become privy. Finally, the notation of "confidential" on the June 12 memo means only that the memo is restricted to those to whom the memo is addressed. As to each and all of the above items, the jurors could not reasonably conclude otherwise. The plaintiffs' effort to connect the term "confidential" in each of these three distinct items to support an inference of malicious conduct by Armstrong represents yet another example of trying to create a picture where there is none.

Thus, the evidence upon which the plaintiffs rely does not support the inferences which they urged upon the jury. Through extracting and emphasizing portions of the evidence out of context, plaintiffs' counsel was able to persuade the jurors to make the impermissible inferential leaps that they did. Once again this Court's earlier analogy to a Dali painting is particularly apt. Another analogy may also be helpful. In the solar system, we are able to connect certain stars with lines to arrive at certain pictures (called constellations), such as the Big Dipper. Such lines would be permissible inferences, given the picture that emerges. In the present matter, plaintiffs have pointed to individual pieces of evidence and asked the jury and this Court to identify a clear, tangible shape from a diffuse, hopelessly unconnected splatter of stars. The picture does not

appear, despite counsel's energetic efforts and not inconsiderable powers of persuasion, because no lines (reasonable, permissible inferences) can be drawn between those stars. Again, plaintiffs' arguments appeal not to reason and objectivity, but rather to emotion, sympathy and speculation. Armstrong is entitled to J.N.O.V. as to punitive damages.

F. *Antitrust Claims*

Two antitrust claims were presented to the jury: TINS' claims that Armstrong used its alleged monopoly power in the alleged resilient floor covering market as leverage either to (1) acquire or (2) attempt to acquire a monopoly in the alleged market of "video magazine for floor covering retailers," in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

The jury found, by way of special interrogatories, that Armstrong enjoyed monopoly power in the resilient floor covering market or submarket, and used that monopoly power to obtain a monopoly in the video magazine for floor covering retailers' market or submarket.[26] Similarly, the jury found that Armstrong used its monopoly power in the resilient floor covering market to attempt to obtain a monopoly in the relevant video market or submarket. Whereupon, the jury awarded $19.5 million in compensatory damages on the antitrust claims.

This Court, reviewing all of the evidence, determines that no reasonable jury could have found for the plaintiff TINS on its antitrust claims. As the jury was instructed, an antitrust plaintiff must prove three elements in order to recover damages: (1) an antitrust violation (here, Section 2); (2) fact of damage or injury; and (3) measurable damages. *See e.g. American Bearing Co., Inc. v. Litton Industries*, 729 F.2d 943, 948 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984); *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983). In the present matter, the jury should

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[26] Hereinafter, this alleged market will be referred to as the "relevant video market" recognizing that if it exists at all, it is the very specific market which the full term "video magazine for floor covering retailers" defines.

never have reached the damages questions because this case turns on proof of certain elements of the antitrust violations.

Briefly, the elements of the antitrust claims are as follows. First, for both the monopoly and attempt to monopolize claims, TINS was required to prove that there is both a relevant resilient market or submarket and a relevant video market, and that Armstrong enjoyed monopoly power in the resilient market. To succeed in its monopoly claim, TINS had to prove that Armstrong wrongfully acquired monopoly power in the relevant video market (as distinguished from achieving such a position as a consequence of superior product and the like). *See e.g. Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 808 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

To prove attempted monopoly, TINS had to prove that Armstrong specifically intended to monopolize the relevant video market and had a dangerous probability of success. *See e.g. PA Dental Association v. Medical Service Association*, 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). In proving specific intent, "a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not 'predominantly motivated by legitimate business aims.'" (*Id.* at 260-261 (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953)). Direct evidence of specific intent is not required since it may be inferred from predatory or exclusionary conduct. (*Id.* at 261).

Of these elements, several are central to this Court's consideration of the present motions. First, this Court will consider whether the plaintiff[27] sufficiently proved that there is a resilient market or submarket, and second, whether it

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[27] In the portions of this opinion dealing with the tortious interference claims, the Court refers to plaintiffs in the plural because both TINS and Fineman were plaintiffs there. The Section 2 antitrust claims are TINS' alone, hence the use of plaintiff in the singular.

met its burden of showing that Armstrong had monopoly power in that market. The third consideration is whether it was monopoly power which Armstrong allegedly used to cause Stern to back out, rather than some other aspect of their relationship. Finally, this Court will consider whether plaintiff met its burden of showing either that Armstrong had or acquired monopoly power in the relevant video market or had a dangerous probability of success in its attempt to do so.

At this juncture, it should be noted that the jury could rationally and reasonably find sufficient similarity between TINS' and Armstrong's video products to determine that a market for video magazines for floor covering retailers exists, occupied at one time by TINS and Armstrong and now by Armstrong only. This determination is a uniquely factual one, and is arguably supported by viewing the videos themselves, as the jury was able to do. Therefore, this Court will not disturb the jury's finding as to the relevant video market.

1. *Resilient Market*

Review of the evidence in this matter clearly shows that the jury could reasonably have found that there is a resilient floor covering market or submarket. First, there was conflicting evidence as to whether resilient competes with carpet. (*See e.g.* Tr. 9.26 (Lerman); 10.62 (Pomianoski); 16.61-64, 67-70, 73-75 (Humphrey); 22.64 (Funsten)). The jury, weighing and determining the credibility of such testimony, could reasonably conclude that carpet and resilient are in separate markets or submarkets.

Second, contrary to defendant's argument, the jury could reasonably find that resilient and other hard surface floor coverings are in separate markets or submarkets. The evidence on the question was contradictory. (*See e.g.* Px. 6005 (Armstrong booklet on the differences between resilient and other hard surfaces); DePodwin's Report and testimony (Px. 1000D; 30.57-30.58); cf. Tr. 9.22 (Lerman); 8.126-127, 8.131-132 (Fineman); 10.63-10.64 (Pomianoski)). The jury's resolution of that issue will not be disturbed.

2. *Monopoly Power in the Resilient Market*

The second necessary element of both the monopoly and the attempted monopoly claims is proof that Armstrong had monopoly power in the resilient market. Generally, "monopoly power" is defined as the power to control prices or to exclude competition. *See e.g. PA Dental Association*, 745 F.2d at 260 (citing *United States v. E.I. dupont de Nemours & Co.*, 351 U.S. 377, 380 (1956)); *Weiss v. York Hospital*, 745 F.2d 786, 827 (1984), *cert. denied*, 470 U.S. 1060 (1985); *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982).

A primary criterion used to determine whether a defendant has monopoly power in a relevant market is the defendant's market share. *PA Dental*, 745 F.2d at 260 (citation omitted). In fact, existence of monopoly power "ordinarily may be inferred from [a] predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). In *Grinnell*, the Court held that an 87% share of the market constituted monopoly power. (*Id.*) Similarly, in *American Tobacco Co. v. United States*, the Court held that "over two-thirds of the entire domestic field of cigarettes, and ... over 80% of the field of comparable cigarettes" constituted "substantial" monopoly power. 328 U.S. 781, 797 (1946). *See also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 n. 11 (5th Cir. 1984) (citing cases finding monopoly power where market shares ranged from 70% to 100%).

At the other end of the spectrum, a market share of 35% was insufficient as a matter of law to establish monopolization. *PA Dental*, 745 F.2d at 261. *See also Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (citing cases where defendant had less than 25% of the market share, and so did not have monopoly power). In general, most courts accept the rule of thumb enunciated by Judge Learned Hand, that while a 90% market share definitely is enough to constitute monopolization, "it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not." *United States v. Aluminum Company of America*, 148 F.2d 416, 424 (2d Cir. 1945), *approved and adopted*, *American Tobacco*, 328 U.S. at 811-

814. *See e.g. Broadway Delivery Corp. v. United Parcel Service*, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) ("[A] market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.")

Many cases suggest that absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization. *See e.g. Domed Stadium*, 732 F.2d at 489 and n. 11. The same is true with attempted monopoly claims: a market share in the middle of the spectrum requires proof of additional factors before such an attempt may be found. (*Id.* at 490-491).

The evidence in the present matter regarding Armstrong's share of the resilient floor covering market as of 1984[28] is somewhat conflicting. Since the jury was not asked to make a specific determination on the verdict sheet regarding this market share, this Court will, as it must, assume that the jury believed plaintiffs' evidence and determined that Armstrong's share is approximately 50%. As a matter of law, this market share is not alone determinative of whether or not Armstrong had monopoly power in the resilient market.

The plaintiff places considerable emphasis upon evidence that the defendant's market position was "dominant." (Plaintiffs' J.N.O.V. Opp. at 45-46 and evidence cited therein). This evidence is not sufficient to overcome the fact that a 50% market share is not determinative. It is obvious that the term "dominant" (and other such language) reasonably includes a determination that Armstrong had a 50% market share. It is unreasonable, however, to infer from such language that Armstrong had a significantly greater percentage of the market than that.

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[28] The relevant time period on the question of monopoly power in resilient is 1984, since that is the time at which Armstrong allegedly acted.

Because the market share in the present matter is not determinative of monopoly power, other factors must be considered.

> Other relevant factors that the courts have identified include: the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods [or] services from outside the market, and consumer demand factors. A defendant's power either by itself or aided by these other factors must be enough to restrict entry, supply or price.

Weiss, 745 F.2d at 827 n. 72. (citations omitted). *See also U.S. v. DuPont*, 351 U.S. at 403-404 (other evidence, including that showing size and strength of competitors, showed that defendant did not have market power); *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 970-972 (10th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3241 (1990) (reviewing other evidence where market share was at most 40% to 60%); *U.S. v. Syufy Enterprises*, 903 F.2d 659 (9th Cir.1990) (where market share is high enough to create inference of monopoly power, inference may be overcome by evidence of low entry barriers or inability to control prices or exclude competitors)).

This Court finds that the record critically lacks that minimum quantity of evidence of such additional factors which would support a finding that Armstrong had monopoly power in the resilient market. First, there was no evidence that Armstrong had the ability to raise prices in the resilient market. In fact, the only evidence was to the contrary. For example, Daniel Proctor, Vice President of a floor covering distributor who distributed Armstrong products and others, testified that Armstrong has not always been successful in raising prices. Mr. Proctor described a recent example: on November 1, 1990, Armstrong raised its prices but "had to roll back because, quite

honestly, a lot of our competitors did not raise their prices." (Tr. 25.56).

The plaintiff also made much of the evidence that Armstrong's market share has increased in the period from 1984 to 1990. (*See* Px. 5108). This evidence is nonetheless insufficient to support a finding of monopoly power in the resilient market. First, the increase has not been yearly, as demonstrated by Mannington Mills' report showing a decrease in 1989. More importantly, however, the increase reflected in this report is not substantial, showing a total increase of 3.6% for the period between 1985 and 1990. Finally, the same report shows that two of Armstrong's top competitors have experienced an increase in market share over the period and two have experienced a decrease. Thus, while the evidence shows that Armstrong has experienced an overall increase in market share, it is insufficient to support a finding of monopoly power, particularly as of 1984.

The evidence about the size and strength of competitors in the resilient market also shows that Armstrong does not have monopoly power in that market. Fred Lerman, owner of a floor covering distributor that had distributed TINS' video magazine, testified that "our industry is very competitive and everybody that's in business tries to have what I would consider an edge over competition". (Tr. 9.15). Mr. Proctor testified that the floor covering business is very competitive. (Tr. 25.56). James Starks, employed by a competitor of Armstrong, testified that the top three competitors held approximate market shares of 15.2%, 10.9%, and 7.8%. (Tr. 10.117; see also Px. 5108). These unrefuted values, which the jury was not free to ignore, are not insubstantial, and clearly show that Armstrong's competitors are effective forces in the market.

The plaintiff relies heavily on the fact that many floor covering distributors are "captive", in that they sell certain products made by only one manufacturer. (*See e.g.* Px. 1000H, "The Impact of Tariff and Nontariff Barriers on the U.S. Sheet Vinyl Flooring Industry"). Because this system is employed by all major domestic manufacturers of resilient, however, that evidence relates to the definition of the resilient market, not

whether Armstrong has monopoly power in it. The evidence showed that the nature of this particular market is that a manufacturer distributes products through several particular distributors who do not carry the same product manufactured by others. This structure is not the result of any monopolization effort, but rather is a systemic, common practice in the industry. (*See e.g. Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3d Cir.1988) (common practice in the industry necessarily serves legitimate competitive purpose)). The jury could not reasonably conclude from this evidence that Armstrong had monopoly power, because all major resilient floor covering manufacturers operate primarily through captive distributors. Stated somewhat differently, a manufacturer's economic influence over a distributor is a reflection of the one-on-one relationship between that manufacturer and distributor, and so is not probative evidence of monopoly power.

There was also unrefuted evidence that, within the resilient market Armstrong did not even "control" the top distributors. In a list of the top 50 distributors for 1983, only three of the top 10 distributors carried Armstrong resilient products at all. (Px. 623). Of the top 50, only 17 (or 34%) distributed Armstrong resilient products. (*Id.*) Such evidence does not support a finding that Armstrong had monopoly power in the resilient market, and in fact refutes such a finding.

There is considerable evidence that consumers can substitute other hard surfaces and even carpet for resilient products. (*See* discussion regarding resilient market, above). Such evidence, although not determinative of market definition in this case (*supra*), constitutes yet another factor weighing against the reasonableness of the jury's determination that Armstrong had monopoly power in the resilient market.

The plaintiff also relies on various other bits of evidence to oppose the defendant's motion. First, plaintiff asserts that "testimony disclosed that the profits of Armstrong distributors are substantially higher (approximately 300% higher) than those of other distributors." (Plaintiffs' J.N.O.V. Opp. at 46 (citing Tr. 15.68)). Review of the record indicates, however, that this is a mischaracterization of Mr. Humphrey's testimony. His testimony was that Mr. Fineman had indicated

that the usual profit was 1%, and he, Mr. Humphrey, said that was wrong, and pointed to Armstrong distributors' profits of approximately 3%. Humphrey's testimony was not to the effect that Armstrong distributors receive 3% profit while others receive 1%, as the plaintiff claims, but rather was contradictory evidence of profit margins in the industry as a whole, using Armstrong's distributors as an example. This testimony provides no support for the plaintiff's position. The plaintiff also asserts that "Armstrong's advertising expenditures greatly exceed that of its competitors." (Plaintiffs' J.N.O.V. Opp. at 47 (citing Mr. Fineman's testimony at Tr. 1.36)). Once again, the plaintiff mischaracterizes the evidence. The entire relevant section is as follows:

> Q. [Mr. Kramer] Now, did you ever have occasion to compare the revenue that Armstrong enjoyed with the revenue of its closest competitor?
>
> A. Yes, I did.
>
> Q. What was the ratio?
>
> Mr. Voorhees: Excuse me, your Honor. I believe some foundation --
>
> The Court: No context, no time frame. Objection sustained.
>
> Mr. Kramer: Yes, your Honor.
>
> Q. During what time period did you have occasion to make this comparison?
>
> A. I, through my whole -- I spent 21 years in the floor covering industry. 14 of them at Benjamin Berman and then seven with my own consulting company and with

Tins [sic]. Certainly over the period of my consulting years I got to be very familiar with figures for Armstrong; what they spent on advertising, what they spent compared to the [sic] competitors, what their market position was relative to their competitors. It was just information I needed to have to do my business of consulting.

Q. Now, based upon that, did you have any estimate of about how many times, if at all, Armstrong was bigger than its next closest competitor, let's say in advertising revenue for any given period?

Mr. Voorhees: We've narrowed it down to three years, but there's still no explanation [sic] what documents.

The Court: Advertising revenues.

Mr. Kramer: I'm sorry, your Honor, advertising expenditures.

The Court: Overruled. Set a time frame.

Q. Set a time frame before you answer the question, Mr. Fineman.

A. Well, I had, for example, another visual aid which will show that over a period of a three-year period I believe 1984 through 1987--

> Mr. Voorhees: Excuse me, your Honor, could we see the visual aid?
>
> The Court: It's an appropriate moment for the jurors to take a recess anyway.

(Tr. 1.35:21-1.37:9). Thus, Mr. Fineman never answered the question about Armstrong's advertising expenses.[29] It is well settled that an attorney's question does not constitute evidence in a case, and so plaintiff's argument concerning this "evidence" is without merit.

Thus, each of the factors which must be considered weigh only against a finding of monopoly power. Even taken together and considered in a light most favorable to the plaintiff, the evidence in this case is critically deficient and does not support a reasonable jury finding that Armstrong had monopoly power in the resilient market. Accordingly, Armstrong is entitled to J.N.O.V. as to this element, which is enough, by itself, to justify J.N.O.V. as to the plaintiff's two antitrust claims. Nonetheless, this Court will consider proofs as to additional elements as well.

3. *Use of Monopoly Power*

Even if this Court held that the jury correctly determined that Armstrong had monopoly power in the resilient market, it would be compelled to grant Armstrong's motion on the question of whether it was this monopoly power which Armstrong used with Stern.

As explained above, one element of the plaintiff's monopoly claim is that Armstrong willfully acquired or maintained monopoly power in the relevant video market, or, attempted to do so. *See e.g. Houser*, 845 F.2d at 1230. In

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[29] Indeed, the document upon which Fineman was going to base his testimony was not admitted into evidence. (Tr. 1.38-1.52 (voir dire of witness and sidebar discussions)).

other words, the defendant must have acted without a legitimate purpose, and the result complained of was not the result of natural skill, competition, and so forth. (*See e.g. id.* at 1231) (Act complained of was common in the industry and served legitimate purpose, and therefore was not a basis for inferring that the purpose of the act was to willfully maintain monopoly power.)

The specific allegation here was that Armstrong used its monopoly power in the resilient market to catapult itself into the relevant video market by causing Stern to withdraw from the Letter of Intent to become a TINS distributor. (*See e.g.* Plaintiffs' J.N.O.V. Opp. at 12 n. 4: "the same conduct that amounted to tortious interference with contract under state law was independently a violation of the federal antitrust laws because Armstrong leveraged its monopoly power in one market to obtain monopoly power in another"). In other words, the plaintiff's claim is that "the same conduct" of Armstrong which constitutes the alleged tortious interference is also the basis for the antitrust violation. This Court determines that even if the tortious interference claim was sustainable,[30] such conduct is not even arguably the exercise of monopoly power. Therefore, even affording to plaintiff all the evidentiary indulgence that a J.N.O.V. motion requires, no jury could reasonably have concluded that it was.

The evidence in this case, as described above, shows that "captive" distributors are the norm in the industry. By definition, manufacturers are able to exert influence over their distributors; this influence is not, however, exercise of monopoly power. Monopoly power is concerned with the manufacturer's ability to affect an entire market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (The antitrust laws were enacted for "the protection of competition, not competitors.") (emphasis in original). In contrast, the "influence" available to manufacturers like Armstrong depends on the relationship between a manufacturer and each individual distributor. Where the manufacturer supplies a high percentage of the distributor's

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[30] Of course, it was not, as earlier portions of this Opinion reflect.

inventory, or has extended substantial credit to the distributor, a degree of influence or control is to be expected and is therefore reasonably inferred. In addition, exercise of that control is usually within the realm of permissible and legitimate business conduct. Even where exercise of such influence is wrongful, it is necessarily limited to the individual distributor being affected, and therefore does not constitute exercise of monopoly power.[31] Accordingly, evidence related to Armstrong's influence over Stern does not support a reasonable finding that the exercise of any such influence constituted the use of monopoly power.

In addition to evidence showing the customary structure of the industry, there was considerable evidence about the specific relationship between Stern and Armstrong. In particular, Stern was extended substantial credit by Armstrong, and was undercapitalized even to the point of becoming a troubled company, in Armstrong's view. (*See* Px. 5014 (regarding security agreement between Armstrong and Stern); Px. 5015 (regarding personal guarantee of Abrahamson on credit extended by Armstrong to Stern)). Assuming, for purposes of the present analysis, that a reasonable inference from such evidence is that the unique position of Armstrong with respect to Stern would have permitted it to influence (or even coerce) Stern's decision not to become a TINS distributor, that is not the exercise of monopoly power. Any conclusion to the contrary is not supported by the evidence, is not reasonable, and is insufficient to sustain the jury verdict. It was the plaintiff's burden to prove that elimination of TINS from the relevant video market was the result of Armstrong's exercising its resilient market *monopoly* power (not some other power) upon Stern. The plaintiff failed to produce sufficient evidence of this element upon which the jury could reasonably find in it's favor.

Thus, the plaintiff's claims of monopolization and attempted monopolization of the relevant video market must fail

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[31] More specifically, in the case at bar, the record is devoid of any evidence that Armstrong in 1984 discouraged any of its other distributors from becoming TINS distributors. Indeed, Sound, Tri-West and Funston did so, and Bebco had signed a Letter of Intent and paid a deposit.

because the defendant did not use any monopoly power in the resilient market to persuade Stern to back out. Once again, this failure is sufficient by itself to justify granting defendant's motion for J.N.O.V. as to both antitrust claims. There is, however, yet another reason for granting the motion which the Court will now discuss.

4. *No Monopoly or Dangerous Probability of Success*

The plaintiff's claim that Armstrong used its monopoly power to monopolize the relevant video market requires proof that Armstrong in fact acquired monopoly power in the relevant video market. The legal standards for this determination are the same as those relating to the question of whether Armstrong had monopoly power in the resilient market, described above. That is, monopoly power is defined as the power to control prices or to exclude competition. Several factors must be considered here. In the present matter, no reasonable jury could conclude that Armstrong had monopoly power in the relevant video market either in 1984 or since.[32] The evidence is uncontroverted that Armstrong's videos are restricted to information about Armstrong products, and are therefore of no interest to non-Armstrong distributors and retailers. As indicated above, Fineman testified that there are about 450 floor covering distributors. The evidence actually shows that only about 70 distributors received Armstrong's videos in 1984, which represents only about 15.5% of all available distributors. Of these, most did not send the videos to retailers. (Tr. 1.59 (Fineman); 16.55, 17.122-123 (Humphrey); 21.108, 21.110, 21.134-135, 21.140-44 (Downey)). Clearly, this market share is, if anything, evidence of lack of monopoly power in the relevant video market. The evidence also shows

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[32] Armstrong argues that the only relevant period is 1984, the time of the alleged acts. If this is correct, however, no antitrust plaintiff could ever succeed in a leveraging case in which the defendant first removed the plaintiff from the market and then inserted itself at a later date. Certainly, the antitrust laws cannot be skirted by such timing of entry into the market. Furthermore, references throughout this opinion to Armstrong's videos should be deemed to refer to all such products produced or planned over the years to the present date, including the present disc medium Floor Fashion Centers.

that of the top 50 floor covering distributors, only 17 (or 34%) distribute Armstrong products. (Px. 623).

The only reasonable inference from this evidence is that Armstrong's video was of absolutely no interest to approximately 66% of the largest distributors in the market. At most, Armstrong could be said to control 34% of the relevant video market.[33] As the discussion concerning monopoly power in the resilient market shows, 34% of the market is insufficient as a matter of law to support a finding of monopoly power.

Furthermore, consideration of the other factors relevant to the monopoly power determination only supports the inevitable conclusion that no reasonable jury could have determined that Armstrong had monopoly power in the relevant video market. The only evidence as to competitors in the market shows that other manufacturers do produce video programs for their captive distributors, thus showing their size and strength. Furthermore, any other floor covering manufacturer could very easily enter the field by simply providing similar services to its distributors. It is evident from such evidence that Armstrong has no ability to restrict entry into this market, and certainly cannot affect the supply or price of videos which non-Armstrong wholesalers or retailers would be interested in purchasing.

The fact that the jury found that Armstrong is the only company in the relevant video market does not alter these conclusions. The uncontroverted evidence in this matter showed that Armstrong never targeted and does not distribute its video

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[33] It should be recalled at this point that the relevant video market, which the jury reasonably found existed, was not restricted to either Armstrong or non-Armstrong retailers, but in fact included both. Additionally, even if this figure regarding wholesalers does not translate exactly into the same nationwide percentage of retailers, it demonstrates the vast percentage of the market in which Armstrong has no interest and vice versa. Indeed, the record evidence is that Armstrong's penetration of all retail outlets is even smaller because Armstrong sells only through wholesalers while many other manufacturers sell directly to a vast number of retail outlets without intervening wholesaler/distributors. See the considerable evidence introduced by plaintiff to establish a multitude of potential customers for the TINS video magazine.

products to the hundreds of wholesalers who do not carry Armstrong products. These non-Armstrong wholesalers (and *their* retailers) constitute a viable and substantial segment of the floor covering industry. (*See e.g.* Px. 623 discussed above). Thus, Armstrong has not achieved a monopoly in the relevant video market. There is too large a segment of that market which, although arguably not now serviced by such a magazine, could be, without any proven pressure or likelihood of presence therein by Armstrong.

The same evidence also requires this Court to grant Armstrong's motion on the attempted monopoly claims. In order to succeed with a claim of attempt to monopolize, the plaintiff must show, *inter alia*, that there was a dangerous probability that the defendant would have successfully achieved a monopoly. *Stearns v. Genrad, Inc.*, 752 F.2d 942, 947 (4th Cir. 1984) (citations omitted). Although the courts "must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit ... a defendant must have some legally significant share of the market before he approaches the level of dangerous probability of success condemned by the attempt provision of section two." *Domed Stadium*, 732 F.2d at 490 (citations omitted).

A "legally significant share" of the market, although lower than the market share required for a presumption of monopoly power, is nonetheless substantial.

> We do not suggest here a market share percentage that of itself rises to the level of legal significance, but note that a share of less than fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present.

(*Id.*, citations omitted).

In the present matter, Armstrong sold or otherwise distributed its videos to considerably less than 50% of the relevant video market. Accordingly, other factors become important. While there is evidence showing barriers to entry into the resilient market, there is no such evidence concerning the relevant video market. Plaintiff's reliance on the former is simply irrelevant as to the video market.

Similarly, there is no evidence relating to the other factors described by the *Dome* court which would otherwise suggest that Armstrong had a dangerous probability of successfully monopolizing the relevant video market. Indeed, the only evidence shows that a significant majority of the relevant market (that segment which does not distribute Armstrong products at all) has no interest in obtaining Armstrong videos. It cannot be said as a matter of common sense and reason (the proper standards for a jury verdict) that Armstrong attempted to monopolize a market wherein such a large segment would never be targeted for or interested in Armstrong's video products.

Thus, the structure of the relevant video market itself precludes a finding of dangerous probability of success. The unrefuted evidence necessarily negates a finding of specific intent to monopolize because Armstrong has no intent (and certainly no reason) to sell its videos to non-Armstrong distributors. Indeed, all of the memos upon which plaintiffs place great emphasis express the concern that participation by an Armstrong distributor in TINS reduces resources available to devote to selling Armstrong products. Furthermore, non-Armstrong distributors constitute approximately 66% of the 50 leading distributors. Even an intent to sell to 34% of that portion of the market cannot, without more, support a reasonable inference of specific intent to monopolize. This is particularly true where the conduct involved is not in itself egregious or invidious, as the Court has determined in the present case. *See e.g. PA Dental*, 745 F.2d at 261 (Specific intent to monopolize may be inferred from predatory or exclusionary conduct; necessarily, if there is no such conduct, other evidence is crucial).

In summary, then, this Court finds that the evidence proven in this matter critically fails in several crucial respects. First, no reasonable jury could have found that Armstrong had monopoly power in the relevant resilient market. Second, no reasonable jury could have found that even if Armstrong did have such power, it was the exercise thereof which caused Stern to back out of its relationship with TINS. Finally, no reasonable jury could have found that Armstrong has monopoly power in the relevant video market, or that it was dangerously likely to gain such power and had the specific intent to do so.

CONCLUSION

Throughout the foregoing sections of this lengthy opinion, the Court has necessarily commented upon some of the evidence. Although some other items of arguably relevant evidence have not been cited, they have not been ignored. With the benefit of a full transcript and the trial exhibits, the Court has reviewed the complete record. As stated frequently in this opinion, when ruling on a motion for judgment n.o.v. this Court may not substitute its own views for those of the jurors if the latter are reasonably based upon an arguable construction of the evidence. The Court has taken seriously its limited scope of review of the evidence. It has not made its own assessment of the credibility of witnesses. It has not invoked testimony from witnesses whose credibility has been seriously challenged by the plaintiffs. It has indulged all reasonable, permissible inferences, on issues pertinent to the present motions, in favor of the plaintiffs. Evidence invoked by the Court has predominantly (if not exclusively) been that which was stipulated, uncontested, unrefuted and/or presented by the plaintiffs themselves. Viewed in light of the proper standards for considering a motion for J.N.O.V. (*see supra* at 12-13 and *passim*), the Court has exercised its obligation on such motions in order that the "sound" law will control this case rather than "simply drift off into irrelevance" due to the jury's unsupportable "will." *Drabkin v. Alexander Grant & Co.*, 905 F.2d 453, 458 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 559 (1990).

For the reasons set forth above, this Court grants defendant's motions for judgment n.o.v. as to all verdicts

rendered by the jury in favor of the plaintiffs or either of them. An Order For Judgment Notwithstanding the Verdict has today been filed with the Clerk of the Court.

JOHN W. BISSELL
United States District Judge

DATED: June 20, 1991

[ORAL RULING GRANTING DIRECTED VERDICT FOR DEVELOPMENT ON SHERMAN § 1 CLAIM]

[JA 3679] THE COURT: This Court has before it a number of motions for directed verdict which I will rule upon at this time, and we will then proceed with the commencement of the defendant's case.

First, with regard to the common law tort claim for tortious interference with a contractual relationship and/or prospective economic relationship, the Court first determines that New Jersey law will be applied in this matter.

I note initially that my review of the Connecticut case cited by the defendants did not lead me to the conclusion that was argued for by Mr. Wilson. But be that as it may, it is quite clear the dominant governmental interest as well as the most significant particular contacts in this case lie with New Jersey, and more particularly, of course, that being the home state of TINS and Mr. Fineman.

The motion to have the Court impose a directed verdict in favor of the defendant on that claim is also denied. I now turn to the two antitrust claims, which for shorthand purposes we'll call Section 1 and Section 2 claims. I might add this Court's rulings apply equally in my perception not only to the federal antitrust laws but any state antitrust laws as well.

It may well be because there was little argument that interstate commerce was here, this case will be submitted to the jury under the federal law. That is a bridge we can cross [JA 3680] later. It is not critical at this time. I'm quite mindful of the limited New Jersey prudence under the New Jersey act making reference that federal law on these minor provisions

should be considered controlling under the New Jersey terminology as well.

The Section 1 claim which this Court has construed to be as a claim for conspiracy in restraint of trade simply alleged conspiracy between Armstrong and Stern to have an impact, a restraint of trade in the video magazine market. I'm using that terminology loosely. It may be some other technical term that's governing in this case. That claim is dismissed.

Motion on behalf of defendant is granted. I will amplify this opinion at a later time if requested to do so under our local rules. It's this Court's view, however, that under the Columbia Metal case cited by the plaintiff himself for other features, there remains necessity for Section 1 conspiracy claim a unanimity of purpose, a common design and understanding between the coconspirators charged.

In this case, while it might be said that there is a unanimity of purpose or common design and understanding to commit the tort of the disruption of the contractual relationship between Stern and TINS, under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's purpose of eliminating TINS from competition in the video magazine market.

I have studied all the cases that have been cited to me [JA 3681] on this point. I have reviewed particularly such cases as Fragale and Sons and Monsanto to see if they in any way abridge the unanimity or purpose of common design understanding element that Columbia Metal endorses, of course, has its origins at least as early as the American Tobacco case. I find that it does not.

And while, therefore, I think some of those other cases might clearly point to the presence of a conspiracy and something other than merely independent action or decisions, nevertheless, as I construe a Section 1 requirement, this unanimity purpose, common design understanding which must be an object of a legal antitrust injury is not present here, because under no circumstances could it be said that Stern was out here to destroy TINS and eliminate it from the video magazine market.

Stern has had no interest. Whether Stern's went ahead with other distributors or not, there was no evidence in the case that would indicate to the contrary. Accordingly, the Section 1 claim is dismissed. Under that same reasoning with regard to Section 2 claim, any subclaim under Section 2 of a conspiracy to monopolize is also dismissed.

The claims, however, for attempt to monopolize or monopoly by Armstrong in this video magazine market survive. Those don't depend on the establishment of any conspiracy of Stern under a unanimity of purpose or common design and understanding. There is certainly ample evidence to be [JA 3682] presented to the jury with regard to all of the remaining elements of that Section 2 claim. Accordingly, the motion with regard to those features of the Section 2 claim is denied.

I can only assure counsel, hopefully, so the Court took into account pronouncements such cases as Fragale and others regarding what is properly the function of the jury and what is properly the function of the Court into the level of Seventh Amendment analysis. But, nevertheless, it made the rulings I have disclosed at this time. Anything further?

MR. KRAMER: Just very briefly your Honor, if I may suggest the one thing I did not mention during oral argument

yesterday is the doctrine under antitrust law which your Honor may very well be familiar with of unwilling conspiracy. And in the Albreath Herald (phonetic) case the Supreme Court in a footnote made it clear. And what I'm trying to do is reconcile that holding with what your Honor has ruled today.

I'm having, frankly, some difficulty that a coerced alleged conspirator is sufficient under Section 1 purposes. If in this case some definition by someone who is coerced totally. Someone who is coerced cannot claim the same purpose as the coercee. Coercee would not need to be coerced. The last note of the Herald case -- I have the cite.

The Supreme Court for the past 25 years has adhered to that, you don't need to show -- the only common purpose and, you know, perhaps it's certainly my fault in not being sufficiently [JA 3283] articulate enough yesterday. But the only purpose of the common purpose rule is to that they have a common purpose to engage in the acts alleged, not a common purpose of the ultimate goal.

In other words, there's traditional jury instructions under Section 1 that say alleged coconspirators are alleged to intend natural consequences of their acts. May or may not have a point to charge on that.

THE COURT: The Third Circuit in 1990, the elements of this type of claim were reviewed in more general language and required them to agree the objects of a conduct pursuant to that contract or conspiracy were illegal. In this Court's view, illegal must be construed as being an antitrust objective rather than just some other type of illegality that would be tied to conspiracy to interfere with contractual relationship, something like that.

MR. KRAMER: See that's, that's the distinction I'm trying to draw. In other words, under Section 1 as I read those cases, for the past 30 years the Supreme Court has made it clear that to be sure you have to show common purpose, but you don't have to show the thoughts of each conspirator's minds, intent, motive where identical in any case or you barely have an antitrust case except for price fixing.

THE COURT: You wouldn't have to show it definitively, could be shown by proper inference where it lay. I don't want to get into a lengthy discussion on this. Most of the cases you [JA 3684] cited to me would legitimately support an inference from the evidence that the coconspirator would have the same legal antitrust objective as the primary conspirator shall we say.

In many instances that's because the coconspirator is often a distributor in direct competition with the victim. Here *we* have a different set of circumstances. For that reason I think one can't automatically draw that inference based upon the presence of competition or potential competition between those two. That's why I think it was necessary for rather extensive search of the record.

I can assure you for evidence upon which the jury couldn't conclude that this particular antitrust objective was a shared one. Now, I understand your point with regard to coercion, but it seems to me that even the coerced coconspirator has got to be coerced into acquiescence with the antitrust objective. If he is not, if his objectives are other than that, you may well have a conspiracy for this other type of injury but you don't have it for antitrust. That's my ruling.

MR. KRAMER: Yes, your Honor.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5613

ELLIOT FINEMAN; THE INDUSTRY NETWORK SYSTEM, INC.

Appellants

vs.

ARMSTRONG WORLD INDUSTRIES, INC.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 84-03837)

Present: Stapleton and Mansmann, *Circuit Judges*, and Fullam, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel March 3, 1992.

On consideration whereof, it is now here ordered and adjudged by this court that the orders of the said District Court entered June 20, 1991, June 25, 1991, be, and the same are hereby affirmed insofar as the District Court granted judgment

n.o.v. to Armstrong on the Sherman Act section 2 claim and Fineman's individual tort claim, reversed as to the order of the District Court granting judgment n.o.v. on The Industry Network System, Inc.'s ("TINS") tort claim and affirmed as to the grant of a new trial on that claim. It is further ordered and adjudged that the judgment entered in the matter is also vacated as to the order directing that a verdict be entered on the Sherman Act section 1 claim and as to the summary judgment on the breach of contract claim. The cause is remanded to the District Court for a new trial on TINS' tortious interference, breach of contract and Sherman Act section 1 claims. The assignment of costs will be set forth at a later date. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

October 28, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5613

Fineman, et. al.,

Appellants

vs.

Armstrong World, Industries, Inc.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, *Circuit Judges*,
and FULLAM, *District Judge.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker and Scirica would have granted rehearing.

BY THE COURT,

_____
Circuit Judge

Dated: November 24, 1992

*Judge Fullam voted only as to panel rehearing.

Roth Deposition Testimony Read
Into Evidence by Plaintiffs

[JA 3034] Q. Did Mr. Guzinsky say anything about Mr. Abramson's comments about TINS?
A. I don't recall.

Q. And your testimony under oath is that all you said to him was what you have told me, that you were surprised, you expressed this surprise to him and the surprise over the fact that you had or Armstrong had its own video that seemed to you, at least, to be overlapping with TINS?
A. That's correct.

Q. And that was it, end of discussion, [JA 3035] never came up again during that meeting, during dinner? Did you drive Mr. Abramson back to the airport?
A. No, I left both of them at dinner.

Q. During dinner, during that meeting, I want to make sure you understand my question clearly, it was never mentioned again. Is that your sworn testimony?
A. I recall what I have told you.

Q. Did you say to him Alan, I don't think this makes a lot of sense in the Armstrong scheme of things, given the fact that we do have our own video program that can help you increase your profitability, that type of thing?
A. That's probably what I said because we have an overlap program.

[JA 4079] Q. Just what in general terms was the subject to that two, three hours?

A. Well, what I just mentioned. And I think -- well, a lot of it was spent on Stern taking advantage, more advantage of the promotional efforts that we had offered from the resilient side. Bob talked to him about carpeting. At that time he told us about he had signed up for TINS.

Q. That was going to be the next question.
Did TINS come during the course of the discussion?

A. Alan said he signed up for TINS.

Q. Is that pretty much what he said to open up the discussion?

A. As I recall.

Q. Did you respond to it?

A. I was surprised.

Q. You told him that?

A. Yes, I did.

Q. And did you say anything else?

A. Well, I was surprised because I was under the impression at the time that TINS was very similar to what we had been doing as a company for many years, dealer training. It didn't make any sense to me why if he had this program he would want another [JA 4080] program. I was surprised.

Q. Did Mr. Abrahamson say anything to you when you expressed this surprise?

A. As I recall, I think he made a statement that it would fill in a void that we didn't have something like that.

Q. Did he explain to you what about TINS he believed would fill a void that Armstrong didn't serve in this nation? Did he say something?
A. I can't really be specific. At that time I had never seen a TINS video, so I don't really recall specifically what he said. I know he said that, but specifically I don't.

Q. So your best recollection is he said something along those lines?
A. Right.

Q. TINS does something that the Armstrong program doesn't do?
A. Right. I think he said something like that.

Q. Did you respond to that comment?
A. I don't think so.

Q. How was it left? How long did their discussion about TINS last would you say?
A. As I recall, it was a fleeting discussion. We went on to something else.

To ALL FLOOR DIVISION DISTRICT MANAGERS June 12, 1984

From J.E. HUMPHREY, Fl Div, Lancaster

Subject TINS

CONFIDENTIAL

A number of our wholesalers have elected to participate in The Industry Network Systems (TINS), which is a monthly video magazine for floor covering retailers. The monthly video magazine features several segments designed to bring retailers' ideas and information. The TINS program is made available to retailers on a yearly subscription basis, which is merchandised by local distributors. As stated before, we are not in a position to evaluate the effectiveness of the TINS program; however, we feel that since all Armstrong wholesalers are not involved in the program, it would be improper for Armstrong to participate in the system. Therefore, if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer any assistance. You should make sure that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong. Please explain to your wholesalers that our desire not to participate in their program is not due to a lack of interest in retailer training. Quite to the contrary, we have been very much involved with retailer and wholesaler salesmen training in such programs as "Take Charge," and plan to add to this training program which reaches *all* Armstrong wholesalers and retailers.

If you have any other questions about the TINS system or about our participation, please feel free to contact me.

DMN